



**LEGAL CONTROL OF UNFAIR TRADE PRACTICES  
WITH REFERENCE TO MRTP ACT, 1969  
AND CONSUMER PROTECTION  
ACT, 1986**

**ABSTRACT**

**THESIS SUBMITTED FOR THE AWARD OF  
THE DEGREE OF**

**Doctor of Philosophy  
IN  
Law**

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The expression Unfair Trade Practice incorporated in the MRTP Act, 1969 and Consumer Protection Act, 1986, circumscribes many facets of commercial advertising. This advertising has come to be recognised as the most effective tool of modern marketing and essential for the sales promotion. It can convert consumer's "Wish" to purchase, into "Will" to purchase. So long as the trader fairly projects the qualities and other attributes of his wares, he is safe. His campaign can be proscribed only when he makes false or misleading claims. When an advertisement is false or misleading, it is declared as unfair trade practice. The definition of unfair trade practice provided under the two Acts applies to goods and services. However, it is not clear as to whether it applies to goods already in existence or to future goods also. The application of the definition to shares and debentures has not yet come out of the judicial controversy. The scope of the expressions, unfair method, unfair or deceptive acts, has not been delineated.

The varieties of commercial advertising are diverse as is human ingenuity. These advertisements have raised many questions for researchers to ponder. Should commercial advertisement be accorded constitutional protection? Since advertisements are addressed to general public which include; persons of reasonable intelligence, average intelligence and credulous and gullible, the question arises as to whose intelligence should courts consider as a standard to determine whether an advertisement is false, misleading or not? Can advertiser plead defence of mens

rea? Traditionally courts have been lenient to advertiser where his advertisement is found mere puff, for the reason a reasonable person will not take such claim seriously. If consumer will not be allured by such advertisement, then it is difficult to understand why such advertisement is made? Television advertisements have posed new problems for researchers to answer. Sometimes it is not possible to demonstrate the product with its natural colour as it is lost in the television lights. So in order to show the viewers the qualities of the product, it becomes necessary to use artificial product instead of real one. Then the question arises; should demonstration be in comport with the express claim made in the advertisement, or demonstration be treated simply as a warranty and it is only express claim which should be true or both, express claim and demonstration should be true. The line between permissible and non-permissible comparative advertising is not clear. The issues attendant to the comparative advertising are yet to be judicially addressed. There are no rules framed or judicially evolved for the interpretation of the commercial advertisements.

The status of the specific categories of unfair trade practice mentioned in the two Acts, is not clear. Are they unfair per se or rule of reason has to be applied. The scope of these unfair trade practices has not been outlined. The evaluation of the powers of the MRTP and CP Acts dealing with the unfair trade practice, has not been made.



## **Objectives Of The Study**

The main objectives of the study are:

1. A systematic study and evaluation of the conceptual development of the principles relating to unfair trade practices.
2. To examine the specific legal provisions in the MRTP and CP Acts, aiming to curb unfair trade practices and to point out their jurisprudential justiciability to achieve the desired result.
3. To make a comparative analysis (wherever possible) of our law, with the transborder legislations on the subject so as to come out with the suggestions in order to strengthen the existing law.
4. To evaluate the approach adopted by the quasi judicial and judicial authorities to eliminate unfair business practices.
5. To present a comparative account (wherever possible) of the approach of the transnational courts on the subject in order to provide the solution to the issues which have hitherto remained unaddressed.
6. To analyse the powers of the MRTP commission and Redressal agencies and their suitability to curb the menace of unfair trade practices.

## **Research Methodology**

The Study relating to the legal control of unfair trade practice with reference to the MRTP and CP Acts, is a doctrinal research. The statutory material of India, America, Australia, Canada and England relevant to study has been analysed. The case law laid down by the courts and quasi judicial bodies in India and transborder countries on the subject has been examined. The Reports, Journals and Surveys both Indian and foreign have been consulted. The proceedings of the Seminars, Conferences and Symposia have been utilized. The Reports submitted by the various

commissions/committees relevant to the thesis have been studied and referred wherever necessary.

### **Design of Study**

For the culmination of the objectives set to be achieved, the present study has been divided in to the following chapters.

Chapter I gives a sketch of research problem, objectives of the study, research Methodology and design of study.

Chapter II details the historical development of the law relating to unfair trade practices and drives home the point that the catch words of the past, i.e. Caveat Emptor, freedom and sanctity of contract and privity of contract, have out lived their utility due to change in market <sup>the</sup> structure. That there is an urgent need to provide legal mechanism free from these doctrines as is also evinced from the developments which have taken place in the transnational countries.

Chapter III covers the first part of the definition of unfair trade practice. The unfair trade practice may be adopted in respect of goods and services. However, it is not made clear as to whether goods involve only existing goods or also future goods. It has been suggested that the future goods should also be brought within the confines of the definition. Otherwise, there will be two possible difficulties. (1) where for example a company falsely advertises that his goods are of particular quality

and discontinues the advertisement when goods are actually thrown open in the market, then a consumer who purchases goods in pursuance of the advertisement will get no compensation for any loss or injury as the goods were not in existence at the time when advertisement was made. (2) if the view that the goods must be in existence at the time when representation was made is upheld, then the same test should be applied to services also. Since service unlike goods have no permanent existence and may be regarded as being inchoate until they are actually supplied.

The application of the MRTP and CP Acts to shares and debentures is still unresolved. The present interpretation leaves the purchaser of shares and debentures outside the protection of the MRTP and CP Acts. It has been therefore suggested that the investor of money for the purchase of shares and debentures be treated as hirer of service. Since the word "finance" is expressly mentioned in the definition of service, so any false or misleading claim made in respect of shares or debentures be treated as unfair trade practice relating to service.

The term "unfair act" used in the definition has not been defined. The following definition has been suggested.

An unfair act in relation to a trade practice is one which causes substantial injury to consumers which is not outweighed by an offsetting consumer or competitive benefits that the practice produces.

Explanation: while determining as to whether the injury to the consumer is substantial, regard shall be had to the value of the goods or services in question .

Similarly the word deceptive act has not been explained. The following definition has been suggested.

A deceptive act in relation to a trade practice is one which has a potential to mislead consumers of ordinary intelligence with regard to material facts.

Chapter IV titled Commercial Advertising-legal Perspectives covers the issues like, constitutional protection, application of mens rea, standard of protection, defence of puffing, television commercials, comparative advertising and interpretation of advertisements.

The judicial recognition of the fact that the commercial advertising enjoy constitutional freedom is considered by the re-researcher a positive step as the profit motive alone should not be the determining factor for an advertisement to fall outside the freedom of speech. However, this doesn't mean that the advertiser has a right to be wrong but there should be no censure on the dissemination of truthful information needed by the large section of the society designated as consumers merely on the ground that the information has commercial motives. This will naturally need the gleaning of information necessary for subserving public good from that which is false or deceptive.

Although the words like falsely, knowingly, intentionally have been used in the definition of unfair trade practice which denote mens rea, it has been suggested that the compensation for loss caused due to false or misleading advertisement should not

be made dependent upon the presence of mens rea on the part of advertiser. Since the class of practices legislated in the two Acts are not criminal in any real sense but are practices prohibited under penalty, the efficacy of the two Acts cannot be attritioned by reading mens rea in the liability for compensation to the consumer who has suffered loss due to the false representation. The compensation is the only tangible remedy available under the two Acts to deter the unscrupulous trader.

Keeping in view the awareness level of consumer rights in India, it has been suggested that the quasi judicial and judicial bodies should take into account the intelligence of an average person while interpreting an advertisement. In other words, the test should be as to what would be the impression of a person with an average intelligence after listening or reading an advertisement. However, it should not be treated as a general standard. The context in which an advertisement is addressed should also be taken into account. For example, where an advertisement for a specialised equipment is directed at an expert group, such as engineers, the standard will be different as against the advertisement addressed to general consuming public or directed to children.

A considerable latitude has been given to a trader to extoll the qualities of his product. The underlying argument in its defence is that no reasonable man will believe such advertisement as true. But this defence cannot reconcile with the average man's intelligence test as advocated above. Furthermore,

if consumers will not take seriously the exaggerated claims of the trader, then it is difficult to understand why trader is resorting to such puffing. Thus it is suggested that the commercial puffery be made actionable.

Sometimes it is not possible to advertise a product with its natural colour. So some artificial substance has to be substituted to obtain a natural look. This involves the problem of interpretation of television commercials. One possible interpretation is to treat demonstration merely a dramatization of the express claims made in the advertisement. So express claim should be true without caring for the truthfulness of demonstration. Second approach is to treat television demonstration as a warranty without taking into account the express claim. The third approach is the combination of the first two, i.e. to interpret a television demonstration both a warranty that the result could be duplicated without trickery and a proof of the express claim made in the advertisement. A demonstration which failed in either of these tests would be considered deceptive and would not be permitted. It is suggested that the demonstration as well as the express claim made should be correct. In other words an advertisement should be accurate at both ends of the television camera.

Regarding comparing advertising, it is suggested that the insignificant comparisons should be declared as misleading. Otherwise an advertiser will focus more on insignificant comparisons and will derive benefit out of all proportions. Following

are the suggestions which should be incorporated for regulating comparative advertising.

1. The aspects of the advertisers product which are being compared with the competitors product should be made clear.
2. The comparisons should be factual, accurate and capable of substantiation.
3. There is no likelihood of the consumer being misled as a result of comparison, whether about the product advertised or that with which it is compared.
4. The advertisement should not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implications.
5. The subject matter is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case.

Chapter V covers specific categories of false or misleading advertisements. Various sub-clauses of the definition laying down different forms of false or misleading representations are not properly worded. In order to remove ambiguity, it is suggested that sub-clause (1) be amended on the following lines:

The practice of making any statement, whether orally or in writing or by visible representations which is false or misleading that ....

The word "falsely" used in clauses (i) (ii) (iii) and the word "false or misleading" used in clauses (vi) (ix) (xi) should be dropped.

Clause (i) says that it is the practice of making any statement and the word "practice" means a series of acts. It is suggested that clause (i) be read with section (v) (ii) of the MRTP Act so that a single or isolated act of any person in relation to any trade is enough to stamp any trade practice as unfair provided of course other characteristics of unfair trade practice are found.

A question arises; are the labels on the goods as offers? There are two possible interpretations. One is not to use the term in technical sense and not to insist on the dichotomy of the offer and invitation to treat. The other interpretation is to give offer narrow meaning in the sense as is understood in the contract law. It is suggested that the former view should be preferred over the later as it will widened the reach of the provision.

The question as to whether the offering of gifts, prizes or conducting of contests, lotteries, game of a chance or skill are per se unfair has been debated before the MRTP Commission and the controversy is still alive. In order to maintain balance between the legitimate interest of the traders and the consumers, it is suggested:

1. Offering of gifts or prizes genuinely should not be prohibited;
2. Lotteries are against public policy and therefore should be prohibited;
3. Lotteries which do not directly or indirectly demand public subscription should be permitted;



4. Lotteries which run on the finance raised by the public subscription and which involve skill to a substantial degree are not in fact lotteries but game of skill, so it should not be proscribed.

The provision controlling sale or supply of goods hazardous to life is ambiguously worded. It does not make clear as to whether manufacturer or seller is responsible to consumer in case loss or injury is caused to the consumer. It has been suggested that the proper course is to see who is responsible for loss or who is in a position to control the danger.

This provision makes liability dependent on the negligence. The liability under the law of torts is strict and transborder laws also provide no fault liability in such cases. It is suggested that the principle of no fault liability be incorporated in the provision dealing with the sale or supply of hazardous goods.

Chapter (V) deals with the powers of the MRTP commission vis-a-vis unfair trade practices which include (1) Power to issue injunction (2) Power to grant compensation (3) Power to review orders (4) Power to punish for contempt (5) Power to pass cease and desist order and consent order (6) Power to order corrective advertisement.

At present injunction cannot be passed against those aiding, abetting or conspiring the actual wrong doer. So a clause be attached to section 12 -A so as to encompass the above persons also. Whether the interim injunction order is appealable or not

is yet to be resolved. However, examples are in galore where the High Courts or the Supreme Court was called in aid to stay the operation of the injunction order. It is, therefore, suggested that the injunction order be made appealable before the Supreme Court with a clause stating that an injunction order passed by the MRTP commission shall not be called in question in any High Court.

The provision dealing with the compensation provides that in case <sup>of</sup> loss or injury, compensation will be given to consumer. But the word consumer has not been defined in the MRTP Act. So it is not clear as to whether the term consumer includes user of the goods <sup>also</sup> who is not the actual buyer. It is suggested that the definition of consumer as provided under section 2(d) of the CP Act be incorporated in the MRTP Act also.

There is no guidance in the MRTP Act and the Rules and Regulations framed there under regarding the principle for measuring damages. The MRTP Commission expressed conflicting opinions on this point. It is suggested that the principles of law of torts be applied for measuring damages.

The MRTP (Amendment) Act, 1991 provides provision for class action suits. However, the MRTP Commission held that a voluntary registered consumer organisation cannot file suit in the representative capacity as it cannot be said to have the "same interest" as the class has. It is therefore suggested that an Explanation be provided either in the MRTP Regulations or MRTP Act that

"a recognised consumer association shall be deemed to have the same interest as other consumers on whose behalf the consumer association has filed the complaint.

The power of MRTP Commission to amend or revoke its earlier order raises many problems of interpretation (1) Is this power unlimited or, is it subject to limitations? What is the extension of the Commission's power? Does the expression "in the manner in which it was made", imply that the Commission by invoking this provision can order fresh hearing? It is suggested that this is a discretionary power but it cannot be arbitrary, vague or fanciful. It must be guided by the relevant considerations. Although there are no apparent limitations on this power, it cannot be construed so wide as to permit rehearing on the same material. It has to be kept in mind that basically this is a corrective or rectificatory power, "so it cannot be exercised to order fresh hearing. The expression in the manner in which it was made" cannot be construed as giving power to the commission to make fresh order in the same way as previous order was made, i.e. by hearing parties and witnesses. But it merely indicates a procedure to be followed by the commission in amending or revoking an order.

Section 36-D which gives power to the MRTP Commission to pass cease and desist order is not in consonance with section 36-B which gives inter alia power to the Commission to file complaint suo motu either upon its own knowledge or information. Section 36-D provides that the "Commission may inquire into any unfair trade practice which may come before it for inquiry". This

expression does not embrace within its import the suo motu inquiry which the Commission is competent to institute by virtue of section 36-B. It is suggested that the words "come before it" should not be interpreted to mean that it should come before the Commission from other sources than its own knowledge and information. However, in order to avoid any possible controversy, it is suggested that the words "which may come before it for inquiry" be omitted from section 36-D.

A single trader or a class of traders cannot file a complaint. Naturally no cease and desist order can be passed even if the practice is injurious to competing trader or class of traders. Since under section 12-A injunction can be granted on the application of a trader or class of traders and under section 12-B compensation can be granted to a trader or class of traders, so there is need for harmonious construction of sections 12-A, 12-B, 36-B and 36-D. This can be possible only by interpreting the words "Public interest" under section 36-D as to cover both, class of traders as well as a single trader. However, it is suggested that like consumer, trader may be accorded locus standi under section 36-B and Commission be empowered to pass cease and desist order, where a trade practice is prejudicial to competing trader. Since traders as compared to consumers are more alert and conscious of the tricks which their competing traders<sup>employ,</sup> so arming them with the power to file complaint will help in controlling unfair trade practices.

Chapter VI covers powers of the consumer fora vis-a-vis unfair trade practice. At present consumer fora do not possess power to order return of excess price charged. Section 14 be amended in order to incorporate a clause which will run as follows.

To return the consumer the price charged in excess of the price fixed by or under the law for the time being in force or displayed on the goods or in package.

The powers of the consumer fora are restricted to section 14. It is suggested that a residuary clause be incorporated in section 14 which should run on the following lines:

To grant such reliefs as the District forum deems fit in the interest of justice.

The powers to enforce orders are laid down in sections 25 and 27. Section 25 provides that the orders may be enforced in the same manner as if it were a decree or an order made by a court in a pending suit but in case of the inability of the CDRA's to execute their orders, it shall be lawful for them to send such orders for execution to the court. Section 27 provides punishment for defaulter.

The question which has been debated before the Consumer fora is; whether it is necessary that the decree holder must satisfy first section 25 and only then he can invoke section 27 or it entirely depends upon the decree holder whether to take help of section 25 or 27. Basically in sections 25 and 27 two independent remedies have been incorporated by the legislature for executing

the orders of the forum. If the decree holder approaches the consumer forum under section 27, the forum will not be right to ask him to exhaust first section 25 and only then come under section 27. Sections 25 and 27 therefore give two optional remedies to the decree holder and it lies entirely in his discretion what option he is going to exercise.

Section 27 arms the consumer fora with the power to inflict punishment or impose fine on the judgment debtor in case of his default. However, rules have not been framed for the exercise of this power by the consumer fora. It is necessary that an express provision be incorporated in section 27 for the said purpose.

Consumer fora do not possess express powers to issue interim injunction. However, consumer fora have ~~inherent~~ powers to issue the same like that of civil courts. In order to avoid any controversy, it has been suggested to amend sections 14, 17 and 21 to provide express power to grant stay or interim relief by the District forum, State Commission and National Commission.



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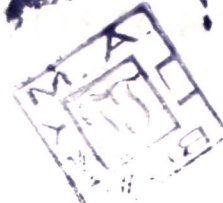
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## ***CERTIFICATE***

Certified that **Farooq Ahmad** has worked under my supervision for the award of his Ph. D degree on "**Legal control of Unfair Trade Practices with Reference to the MRTP Act, 1969 and Consumer Protection Act, 1986**". This analytical research is an original contribution in this field.

A handwritten signature in black ink, appearing to be "S. S. Hasnat Azmi".

**Dr. S. S. Hasnat Azmi**

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# ***Chapter 1***

## **INTRODUCTION**

The twentieth century economists have invented sophisticated ways of mapping consumer behaviour and choice. The initiative lies with the skilled technostucture inside the corporation who can manipulate prices and demand. The technological developments changed the needs and tastes of the consumers. The simple kind of goods and services which were well suited to them in the past, have been replaced by the complex and complicated products. They differ so widely from each other, in terms of use, benefit, efficacy, durability, purity and potency that it becomes very difficult to make their comparative analysis for assessing the suitability of price which the consumer has to pay. The expert knowledge to the consumer is necessary to appreciate the features of these products. But the pace of modern innovations has rendered obsolete, the experience and knowledge of the consumers. So the present day consumer is placed in a precarious position. On the one hand, non expert knowledge will not reveal many important characteristics of modern products, on the other hand, it is not possible for the consumer to have experience and knowledge about the each product which he is going to purchase.

In absence of any Governmental and non Governmental agency to provide the relevant information about the product, consumers have to rely on the information provided by the trader. This information is disseminated through the electronic or print media or through hand bills, drum beats, samples, stickers, sales talks or door to door salesmen etc. Advertisements and other sales promotion schemes have become well established modes of modern



business. The sponsor of this information is manufacturer or seller himself. His prime motive is the more and more sale of his own product and not to provide consumer, correct information for right purchasing decision. The advertisement to the consumer should not be deceptive has always been one of the points of conflict between business and consumer.

The traders in order to ensure smooth sailing of their products, resort to unfair business practices. Their advertisements often fail to inform consumers about the utility, characteristic, grade, quality, durability, purity etc of the product and in addition raise expectations beyond that which can be fulfilled by a product or service. Instead of making blatantly false or misleading statements, the traders dexteritly make the half truth or ambiguous statements. They omit factors which would be unfavourable to them but would influence consumers attitude and undue emphasis is given to the insignificant or irrelevant information. The advertisements are composed or purposefully printed in such a way as to mislead. The goods or services of rival competitors are being disparaged in order to bring their own goods into lime-light. The false comparative analysis about the different products is being highlighted in order to project own product. The false warranties and guaranties relating to the length of the life of product, durability, potency and like are being announced without any reasonable basis. Fictitious bargain offers are made to deceive consumers. Many devices are used to lure buyers into believing that they are getting something for nothing or at a nominal value. The advertisement of goods at

discount rates or along with gifts or prizes are being made without any intention to fulfil the promise. The contests and lotteries are being conducted for promoting business interests.

These unfair business practices are diverse in nature as is human ingenuity. Since man has not stopped thinking, so he continues to contribute to the development of techniques and designs of salesmanship. In India false and misleading advertisements are rampant. The consumer complaints council CCC, a wing of the advertising standard council of India ASCI, received more than 1,200 complaints against advertisements since its inception in 1985 and around 95 per cent of these were misleading.

Today the marketing of goods and services is being made through the trained business executive. Untrained consumer is no match for the businessman. The balance of power is weighted in favour of traders who employ expert advisers for marketing, research to know consumer preferences and to represent their view point before government. In fact they work round the clock on their business and they put every effort to ensure smooth sailing of their goods and services. In contrast, consumers are not organised, they suffer in silence. They therefore, need protection against the unfair business practices of the traders.

The MRTP (Amendment) Act, 1984 and Consumer protection Act, 1986 have been passed to deal with the unfair business practices. The legal provisions curbing these practices were originally borrowed from the Trade Practices Act, 1974 of Australia. However, with the passage of time this law was found inadequate to

cope up with the new unfair practices floated by the traders. So it was thought necessary to have flexible provisions which will embrace not only existing unfair trade practices but also those to be invented in future. To achieve this goal, the MRTP (Amendment) Act, 1991 and Consumer protection (Amendment) Act, 1993 were passed. The language of section 5 of the Federal Trade Commission Act, 1914 of USA as amended by the Wheeler Lea Amendment Act 1938 has been adopted in the definition of the unfair trade practice. Since much time has not elapsed when new concepts have been incorporated, the Regulatory Agencies under the MRTP and CP Acts have not found occasion to dwell deep on the issues which have rocked the courts in America and Australia. Till date, these Regulatory Agencies have laid down mechanical judgments and no plausible jurisprudence has been evolved. The ambit and scope of the expressions, "unfair method , unfair or deceptive act" used in the definition of the Unfair Trade Practice is yet to be delineated. No thought has been given to the question as to under what circumstances an advertisement may be called as false or misleading ? What should be the standard of proof for such advertisement ? The application of puff. and Mens rea to commercial advertisements is still unexplained. The new dimensions of consumer deception added by the television commercials have not been addressed. The nebulous issues relating to Bargain offers, offering of gifts, prizes, and holding of contest, lottery or goods involving risk are unresolved.

The powers of the MRTP Commission vis-a-vis unfair trade practices differ from the powers of the Redressal Agencies. Neith-

er the MRTTP Commission nor Redressal Agencies have made any plausible evaluation of the ambit and scope of their powers. These are some of the core issues which the researcher aims to address in the present thesis.

#### OBJECTIVES OF THE STUDY:

The main objectives of the study are:

- 1) A systematic study and evaluation of the conceptual development of the principles relating to unfair trade practices.
- 2) To examine the specific legal provisions in the MRTTP and CP Acts, aiming to curb unfair trade practices and to point out their Jurisprudential Justiciability to achieve the desired result.
- 3) To make a comparative analysis (where ever possible) of our law, with the transborder legislations on the subject so as to come out with the suggestions in order <sup>to</sup> strengthen the existing law.
- 4) To evaluate the approach adopted by the quasi judicial and judicial authorities to eliminate unfair business practices.
- 5) To present a comparative account (wherever possible) of the approach of the trans-national courts on the subject in order to provide the solution to the issues which have hitherto remained unaddressed.
- 6) To analyse the powers of the MRTTP Commission and

Redressal Agencies and their suitability to curb the menace of unfair Trade practices.

#### **RESEARCH METHODOLOGY:**

Research Methodology is the means through which desired objectives are sought to achieve. It involves a systematic planning and comprehensive methods. The type of steps to be taken in research depends upon the purpose for which the research is under-taken. The study relating to the legal control of unfair trade practices with reference to MRTP and CP Acts, is a doctrinal research, so statutory material of India, America, Australia, Canada and England relevant to the study has been analyzed. The case law laid down by the courts and quasi judicial bodies in India and transborder countries on the subject has been examined. The Reports, Journals and surveys both Indian and foreign have been consulted. The proceedings of the Seminars, Conferences and Symposia have been utilized. The Reports submitted by the various Commissions/Committees relevant to the thesis have been studied and reflected where-ever necessary.

#### **DESIGN OF STUDY:**

For the culmination of the objectives set to be achieved, the present study has been divided into the following chapters.

Chapter-I is introductory in nature. It highlights the need for the present research and projects some of the issues which have been addressed in the thesis. The objectives for the thesis and research methodology have been given along with the design of the

thesis.

**Chapter-II** gives a historical retrospect of the unfair trade practices. The time honoured doctrines of past have been analysed and their in-efficacy in changing market structure has been highlighted. The legislative developments in relation to unfair trade practices and the reasons which led to the enactment of the MRTP (Amendment) Act, 1984 and consumer protection Act, 1986 have been presented along with the up to date amendments in these Acts.

**Chapter-III** analyses the first part of the definition of unfair trade practice. This definition is silent on the issue as to whether it applies to existing goods only or to future goods also. The application of the two Acts to shares and debentures has not been yet resolved. The parameters of the expression, unfair or deceptive acts or practices, have not been outlined in the definition and the MRTP Commission or the Redressal Agencies have not found opportunity to deliberate upon. This expression has been borrowed from section 5 (a) (1) of the Federal Trade Commission Act 1914 as amended by the Wheeler Lea Amendment Act, 1938 of United States. So the Judicial interpretation put by the American Courts and the limitations of that interpretation have been examined. The approach which the MRTP Commission and the Redressal Agencies should adopt, has been suggested.

**Chapter-IV** covers commercial advertising in legal perspective. Since unfair trade practices under the MRTP and CP Acts involve

Commercial advertisements of diverse nature, so separate treatment has been given to commercial advertising and issues like opinion of the consumers in Britain, Europe (including Britain) and India about the advertisements, constitutional protection, application of mens rea, standard of protection, defence of puffing, television commercials, comparative advertising and interpretation have been discussed.

The surveys conducted in Britain, Europe (including Britain) and in India have been presented to project the opinion of the consumers who believe that most of the commercial advertisements are false or misleading. Through statistical data it has been shown that the traders through out world have steadily increased advertising expenditure. Thus there is every reason to regulate these advertisements to ensure that they are not false or misleading. Nevertheless, it has been argued that the importance of information to the operation of efficient markets is by now fairly well accepted , the trader should have constitutionally protected right to highlight the merits of his goods or services. Advertising should be treated as speech and thus falling under the fundamental right of freedom of speech. The element of trade, commerce or profit motive should not distinguish the commercial advertisements from the speech.

The application of mens rea to commercial advertisements has not yet received judicial attention. The words like falsely, intentionally and knowingly have been used in these two Acts and they denote mens rea. Then should mens rea be imported

in the definition and in its absence trader be not held liable to compensate for any loss ?.

The aim of the law controlling unfair business practices is to protect consumers. The consumers are vast multitude of public including, persons of average intelligence, credulous and fatuous and reasonably intelligent persons. The question arises as to whose intelligence should MRTP Commission and redressal agencies treat as a standard to determine the nature of the advertisement. This issue has not been authoritatively resolved yet. The defence of puffing in the advertisements has provided an escape route for the traders to cheat the innocent consumers. It is said about the puffing that reasonable consumers cannot be misled by it, but if it creates no impression on consumers, it is difficult to see why it is used? The commercial advertisements on television have posed new questions for the researchers to answer. The natural colour of the products is lost in transmission on the television screen, so in order to give a natural look in the advertised product, artificial substances have to be substituted in order to give natural look. Then if the demonstration made on the TV screen is false but the express claim made with the demonstration is correct, can such advertisement be treated as false and what will be the position where demonstration is true but the express claim made is false? The use of celebrity to advertise goods or services has now become common. The non expert knowledge of the celebrity about the advertised goods or service is yet another thought provoking issue relating to false or misleading advertisements.



The comparative advertising is a species of commercial advertising and like its genus is double edged. It has been now judicially recognised that the truthful comparative advertising shall not be prohibited but to determine whether the particular comparative advertisement is false or misleading or not, is not free from difficulty for the reasons (a) there is no clear line between comparative and non comparative (b) a considerable amount of puffery has been traditionally been allowed in advertising, the same is true in case of comparative advertising. The limits of permissible puffery are far from being clear. No guidelines have been framed to determine the correctness of a comparative advertisement. Although it has been argued in the thesis that there is no reason to extend this common law principle of puffing in the present day consumer protection law, there is no decision of the judicial or quasi judicial bodies on this point.

Although there is a consensus that the false and misleading advertisements are bad, few however, agree about how best to tell whether an advertisement is misleading. In the light of the judicial decisions, various rules for the interpretation of the advertisements have been suggested.

Chapter V deals with the specific categories of unfair business practices as incorporated in the definition. A detailed discussion on sub clauses (1) to (x) and clauses (2) , (3) and (4) covering bargain offers, offering of gifts, prizes, holding of contests and lotteries and goods involving risk of injury, has been made. Sub clauses (1) to (x) are not properly worded. Some

sub clauses use the term "falsely" and some "misleading", thus giving an impression that where a representation is misleading and not blatantly false, will not be covered by the clause using the expression "falsely". This is not correct. However in order to remove any doubt an amendment has been suggested. Various expressions used in these sub clauses have been discussed in the light of the transborder Judicial pronouncements in order to outline their scope.

The provisions dealing with the Bargain offers do not cover a situation where trader disparages his own goods to a consumer who has visited his establishment in response to the bargain offer made in the advertisement and then switches the consumer to another profitable item. It is not clear as to whether the labels on the goods or catalogues making offers be construed as offers or mere invitation to treat. The provision expressly states that the intention of the traders not to supply goods at the bargain offer must be proved. The proof of intention is not easy and consumer cannot get compensation where he fails to establish the intention of trader, not to provide goods at bargain offer. Whether the trader making a bargain offer should mention the period, during which said bargain will last, in the advertisement itself or without mentioning period, the bargain offer should remain valid for a reasonable period is not clear. The Explanation attached to the provision is also ambiguous.

The status of sales promotion devices, e.g. offering of gifts, prizes, holding of contests and lotteries has not been authoritatively resolved. The MRTP Commission has expressed

conflicting opinions on the question as to whether these devices are perse unfair trade practices or capacity to cause loss or injury to the consumer, has to be proved.

The traders do not hesitate in marketing the goods which are hazardous to life and property. The provisions which prohibit such trade practices do not make clear as to whether in case of injury to the consumer, against whom should he file complaint? should he file complaint against manufacturer or seller? The conflicting opinions have been expressed on the question as to whether loss or injury" covers only physical loss or loss of any sort..ls1

**Chapter VI** out lines the powers of the MRTP Commissions vis-a-vis unfair trade practices. This chapter is having six sub chapters titled as (1) power to issue injunction (2) power to grant compensation (3) power to amend or revoke orders (4) power to punish for contempt of commission (5) power to order corrective advertisement (6) power to pass cease and desist order.

The power to grant compensation has raised the issues like, locus standi to voluntary organisations, application of the limitation Act and mens rea, the principles applicable for measuring damages and the consumer's duty to mitigate. The right of consumers to file class action suit has many attendant legal queries yet to be resolved.

The issues relating to the power to grant injunction have been subject to many conflicting observations of the MRTP Commission and at present injunction cannot be issued against those who

are aiding or abetting the trader who has resorted to unfair trade practices.

The power to order corrective advertisement has been provided in the MRTP (Amendment) Act, 1991. It is yet to be seen as to how it reconciles with the commercial advertisements as these advertisements fall within the Freedom of Speech and Expression guaranteed under Art, 19 (1) of the Constitution.

The scope and ambit of the power to amend or revoke the earlier order has been called in question before the apex court. It has also raised many questions of procedural nature. Can one Bench hear the review application of the case decided by another Bench? Can larger Bench be constituted to hear the review application?

The power to issue cease and desist order involves questions relating to locus standi of trader, practices which have been discontinued before passing cease and desist order, and implications of this order. Another pertinent issue is the status of the consent order.

Chapter VII deals with the powers of the consumer fora vis-a-vis unfair trade practices. This chapter has been divided into five sub chapters namely; power to remove defects and deficiencies; power to award compensation; power to enforce orders; power to issue Interim orders and who can file complaint against whom ?

At present consumer fora have no power to order refund of price or charges which the trader or provider of service has

received from the consumer. Similarly non supply of goods or services does not fall either in "defect" or "deficiency" as defined in the CP Act.

The power to award compensation is still subject to negligence of the respondent despite the fact that all the consumer legislations throughout the globe provide for strict liability.

The power to enforce orders has generated debate among the various fora about the true scope of sections 25 and 27. No rules have been framed for the exercise of the powers by the consumer fora under section 27 and the application of criminal procedure code to section 27 is also not free from doubt. It is also not clear as to whether order made under section 27 is appealable or not.

The consumer fora do not have express power to pass interim order. There is a controversy as to whether power to pass final order includes an inherent power to pass interim order.

The question germane to the present study is who can file complaint and against whom? The CP Act provides that besides consumer, state and central governments and voluntary consumer organisations can file complaint. It is also provided in the Act that a purchaser of goods for resale or for commercial purpose is not a consumer and therefore cannot file complaint under the CP Act. Before Amendment Act, 1993, the expression commercial purpose came up for deliberation before various consumer fora and they expressed conflicting opinions. In order to resolve this issue an explanation was attached to the definition of consumer through the Amendment Act, 1993. However, this explana-

tion is also not in concord with the overall scheme of the CP Act. So several principles have been suggested to determine as to whether goods are for commercial purpose or not.

It is not clear as to whether consumer can also file complaint against the actual manufacturer when he has purchased goods from a vendor who is not the actual manufacturer.

Chapter VII titled conclusions and suggestions covers the research findings and suggestions to strengthen the existing law and to resolve the present controversies which have come on the fore due to conflicting interpretations of various provisions given by the MRTP Commission and consumer redressal agencies.

# ***Chapter II***

## **UNFAIR TRADE PRACTICES - A HISTORICAL RETROSPECT**

Unfair trade practices are as old as the trade itself. However, the legal mechanism to curb these practices took its own time to settle. Although, the courts from the very beginning were quick to condemn the unfair or misleading conduct in dicta<sup>1</sup>, Judicially imposed limitations and practical considerations of time and cost confined these remedies to narrow circumstances. The tenderness exhibited towards trade practices of doubtful probity was rooted in the history of markets and fairs in the medieval England, in which trust was neither given nor expected<sup>2</sup>.

In the medieval days, transactions of sale and even of barter between strangers were few and rare. When trading did take place, it was in markets and fairs where the goods were openly displayed. So it was presumed that the buyer relied on his own skill and judgment. Only a fool would rely on the word of stranger, he might never see again -- the idea of *Caveat Emptor* well reflected that practice<sup>3</sup>.

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1. American Wash Board Co v. Saginaw Mfg. Co, 103f 281 (6th cir,1900).
  2. Developments in the Law : Deceptive Advertising 80 Harv. L. Rev. 1013 (1967).
  3. Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale LJ. 1133 (1931); See also Horwits, The Historical Foundations of Modern Contract Law, 87 Harv. L. Rev. 917, 945-52 (1974); Gordon Borrie and Aubrey L.Diamond; The Consumer Society and the Law, (4th ed. 1980) at 19.



At common law unfair trade practices are subject to legal control through three types of remedies<sup>4</sup>.

1. Civil suit by consumer. The remedy sought to be enforced through a civil suit was either Tortious or Contractual.
2. Civil Action By Competitors\*.
3. Criminal prosecution\*.

#### Civil Suit By Consumer: Tortious Remedy

Only towards the end of the eighteenth century did common law impose liability for dishonesty<sup>5</sup>, the fons'et origo of deceit being *Pasley V. Freeman*<sup>6</sup>. It assumed its modern shape after *Derry V. Peek*<sup>7</sup>.

The following four<sup>8</sup> elements have to be satisfied for successful action for deceit:

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\* These remedies will not be discussed as they fall outside the scope of the present study.

4. For illuminating discussion on common law remedies and attendant legal obstacles, see Hester, Deceptive Sales Practices and Form of Contracts -- Does The Consumer Have A Private Remedy? (1968) Duke LJ. 831.
5. R.W.M Dias et al, Tort Law (1984) P 184.
6. (1789), 3 T.R. 51; 100 ER. 450.
7. (1889), 14 APP. Cas 337.
8. Howard Allan Bartnick is of the view that the plaintiff in order to prevail in an action in deceit, has to show: (a) that the representations were made by the defendant; (b) that they were made knowingly and with design false; (c) that they were made for the purpose and intent to deceive and defraud; (d) that they did deceive and defraud; (e) that they related to an existing or past fact; (f) that the party to whom the false statements were made did not know that they were false (g) that he relied on their truth and suffered loss; See Howard Allan Bartnick; Consumer Protection in Georgia: The Fair Business Practices Act of 1975, Emory LJ vol 25 (1976) P 445. See also a comment on Maryland's Consumer Protection Act: A Private Cause of Action For unfair or Deceptive Trade Practices. Maryland. L. Rev. vol 38 (1979) at 733.

1. a false statement made, orally, in writing or by conduct<sup>9</sup> of existing facts<sup>10</sup>;
2. made with the knowledge of its falsity or recklessly, not caring if it be true or false<sup>11</sup>;
3. with the intent that the plaintiff should act on it<sup>12</sup>, &
4. the plaintiff does act on it to his detriment<sup>13</sup>.

A deceived buyer might bring an action for deceit against a seller who had falsely advertised a product but legal pitfalls and requirements of proof made this remedy illusory<sup>14</sup>. It is not easy to prove scientor, a basic premise to fix responsibility. Secondly, to show that a reasonable consumer would have relied on like representation is often difficult to establish. Probably the most trouble-some requirement is that the statement must be related to a past or existing fact and not an opinion stated by the seller. This requirement leaves a large grey area where the merchant who has made exaggerated claims about his

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9. R.V. Barnard (1837) 173 ER 342.

10. Promise and declaration of future purpose are not generally actionable. If however, the declaration of purpose can be constructed as a representation of a present state of mind, it will be treated as a statement of fact, Edgington v. Fitzmaurice (1885) 29 chn 459.

11. Supra note 6.

12. Langride V. Levy (1837); 150 ER. 863, 1458.

13. The damage is the gist of the action. Smith V. Chedwick (1884) 9 APP Cas. 187. 196 per lord Black-buns; For judicial statement of the requirements see lord Maugham in Bradford Third Equitable Benefit Building Society V. Borders (1941) 2 All. ER. 205 at 211.

14. See generally Bohlen; Misrepresentation As Deceit, Negligence or warranty, 42 Harv. L. Rev. 733 (1929).

product can maintain that his statement was mere "puff" <sup>15</sup> and he should not therefore, be held liable. Although, some writers<sup>16</sup> are of the opinion that it is reasonable to grant some latitude to the producer pro-claiming the merits of his own goods, there is a school of thought which believes that the category of fact and opinion in an action for deceit had an adverse effect on the information value of advertising<sup>17</sup>.

### Contractual Remedy

Three associated principles permeated the development of Law of contract. These are (a) Caveat Emptor (b) Sanctity of contract (c) Privity of contract. These Principles are discussed here under.

#### a) **Caveat Emptor:**

Caveat Emptor has its origin in the Middle ages and was dominant feature of the sale of horses in market over<sup>18</sup> Since all sales used to take place in the open market where seller and buyer were face to face, it was presumed that since buyer is the

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15. Puffing can be defined as a representation by the seller which are merely opinions or commendations of the quality of goods or affirmation of their value see Ga. Code. Ann 109 A-2-313 (2) (1973).

16. See Bishop, Advertising and the Law, Benn (2nd ed) at 47; Prosser, Hand Book of the Law of Torts (4th ed 1971) at 723. For judicial opinion see *Kirchner V. F. TC 63 FTC 1282* (1963).

17. See E. Rogers; Goodwill, Trade Marks and Unfair Trading 98(1914).

18. Market overt means an open public place legally constituted market. *Lee V. Bayes* (1956) 18 CB 599. For detailed discussion on this issue see P. S. Atiyah *The Sale Of Goods* (8th ed. 1990) at 368.

best judge of his own interest, so if he makes a wrong selection by his own choice, he cannot complain later-on against the seller. As the Judge in Fifteenth century case said: if a man sells me a horse and warrants that it has two eyes, and it has not, I shall not have an action. I can know this for myself from the beginning<sup>19</sup>. This legal position remained unchanged till seventeenth century. Then the express warranty was given effect & buyer was given remedy when goods did not conform to the warranty. J. Fitzherbert a seventeenth century judge observed:

If a man sells unto another man a horse, and warrant him to be sound and good, if the horse be lame or diseased, that he cannot work, he shall have an action against him... But note: it behoveth that he warrant the horse, without such warranty, it is at the other peril and his eyes ought to be his judge in that case<sup>20</sup>.

In the last quarter of seventeenth century, courts did not insist on the express promise or warranty on the part of seller. In *Cross V. Gardner* <sup>21</sup> the buyer bought two oxen, the seller represented that they were his own but infact belonged to another and were taken from the buyer. Chief Justice John Holt said that since no amount of examination of the oxen here would reveal their true owner and credit given on the affirmation makes the action lie. Thus there was an implied warranty that the seller at

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19. C.f. Gordon Borrie and Aubrey L Diamond; *The Consumer, Society And The Law* (4th ed. 1980) at 20.

20. *Id* at 19.

21. (1688), Carth 90.

the time of sale had right to sell<sup>22</sup>. Hundred years later, Justice Buller in *Pasley V. Freeman*<sup>23</sup> interpreted the observation of John Holt in *Cross V. Gardner*<sup>24</sup> to mean that there is no distinction between warranty and affirmation and real test lies in the intention of the parties<sup>25</sup>.

The beginning of the nineteenth century marked a complete shift from the original insistence of the courts on words of the promise. Now courts began to infer the promise from mere fact of sale. Even though nothing was said. Thus in *Gardiner V. Gray*<sup>26</sup>, the buyer had agreed to purchase twelve bags of waste silk which turned out to be unmerchantable, Lord Ellenborough held that when there is no opportunity to inspect a commodity, the maxim Caveat Emptor cannot apply. The goods must be saleable under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on dunghill.

Few years later in *Jones V. Bright*<sup>27</sup>, the plaintiff bought from a manufacturer some copper for a stated purpose of sheathing a ship. it lasted only for 4 months instead of normal 4 years. CJ Sir William Best in his new found vigour observed:

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22. Emphasis added.

23. (1789) Term Rep. 51.

24. Supra note 21.

25. Modern reflection of this type of distinction can be found in *Oscar Chess Ltd v. Williams* (1957) ICLR 370.

26. (1815) 4 Camp 144.

27. (1829) 5 Bing 533.

I wish to put the case on the broad principle, if a man sells an article, he thereby warrants that it is merchantable that is, fit for some purpose. If he sells it for a particular purpose, he thereby warrants that it is fit for that purpose. If that turns out not fit, the buyer will have remedy<sup>28</sup>.

Last quarter of the 19th century saw in England, the enactment of Sale of Goods Act, 1893<sup>29</sup>. This Act represented an important step in the abandonment of the original common law rule of caveat Emptor. The Judicial pronouncements in *Cross V. Gardner*<sup>30</sup>, *Pasley V. Freeman*<sup>31</sup>, *Cardiner V. Gray*<sup>32</sup> and *Jones V. Bright*<sup>33</sup> found legislative recognition in Sections 13, 14(2) and 14(3) along with the Caveat Emptor. Thus this was the precursor of the shift from Caveat Emptor to Caveat Venditor<sup>34</sup>. However, there was no provision in the Act to prevent the seller from contracting out his liabilities. To plug this loophole, Supply of Goods Implied Terms Act, 1973<sup>35</sup> was passed on the recommendations

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28. Emphasis added.

29. Indian Sale of Goods Act, 1930 is a replica of English Sale of Goods Act, 1893.

30. Supra note 21.

31. Supra note 22.

32. Supra note 25.

33. Supra note 26.

34. P.S. Atiyah opines that indeed it is now unrealistic to treat the basic principle of law as Caveat Emptor rather than Caveat Venditor. The sale of Goods (8th ed. 1990) at 125.

35. Law Commission Report, First Report on Exemption Clauses in contracts (1969) law Com. No. 24 (1968-69) HC 403. Paras:4.1-6.24 at 517.

of Law Commission<sup>36</sup>, which restricted the seller from contracting out the implied terms. In 1979 a consolidated Sale of Goods Act was passed in which the amendments made by the 1973 Act, were incorporated. The Sale of Goods Act, 1979 has caused hardships to the seller as the buyer is given right to reject the goods even on trivial grounds. In order to maintain the balance, English law commission after issuing a working paper in 1983<sup>37</sup> published final report, Sale and Supply of Goods in 1987<sup>38</sup>, which recommended certain changes in the Sale of Goods Act, 1979. These changes have been accepted by the Government in principle. However, these changes will not affect the consumer transactions<sup>39</sup>.

#### **Freedom and Sanctity of Contract:**

Early development of law of contract was greatly influenced by the then prevailing moral values and business norms. Although, English Law of Contract has taken its roots in the Middle Ages, most of the general principles were developed and elaborated in the eighteenth and nineteenth century, the days of natural law. To the Judges of eighteenth century, theories of natural law

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36. No such Act has been passed in India.

37. Working paper No. 85, Sale and Supply of Goods.

38. Law Com. No. 160 Cm 137 (1987).

39. Broadly, the proposals inter alia are that no change is to be made in consumer sales, but in non consumer sales the buyer will no longer have the right to reject the goods in case there is a breach of the statutory requirements as to quality where the breach is so slight that it would be unreasonable to reject the goods (section 15 A).

meant that men had an inalienable right to make their own contracts for themselves and to the Judges of the nineteenth century similarly meant that the law should interfere with the people as little as possible<sup>40</sup>. The theme of this dogma is well reflected in often quoted passage of Sir George Jessel<sup>41</sup> that if there is anything more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and their contracts, when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of Justice. Thus the main thrust was given to promise<sup>42</sup> which once made was held sacred and was enforced. The notion was that the oxen are tied by their horns<sup>43</sup> and men by their promises. Judges task was relegated to that of an umpire who was called on only when some thing went wrong. Thus the shibboleths freedom of contract and sanctity of contract became the foundation on which the whole Law of contract was built. This

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40. P.S.Atiyah; An Introduction to the Law of Contract, 2nd ed. 1977 at 5.

41. Printing and Numerical Registering Co V. Sampson (1875) L R 19 Eq P.465; Similar views were expressed by Henrey Sidgwick in his Elements of politics; suppose contracts freely made and effectively sanctioned and the most elaborate social organisation becomes possible at least in a society of such human beings as the individualistic theory contemplates gifted with mature reason and governed by enlightened self interest, cited in Kessler and Gilmore contracts, Cases and Materials 2nd ed. 1970 at 4.

42. For detailed account of promise as the basis of contract see Randy E Barnett, A Consent Theory of Contract, Col. L. Rev vol 86 Jan 1986.

43. Walter Stren, "Consideration and Gift," 14 Int & Com. L. Quart. 677.



unlimited freedom of contract and its sanctity proved divorced from the reality in nineteenth century hence. The emergence of standard form contracts<sup>44</sup>, giving the consumer an option either to take it or leave it<sup>45</sup> with no scope to negotiate, exposed the limitations of freedom of contract theory.

As the nineteenth century waned, the very freedom of contract with its corollary, the freedom to compete, was merging into the freedom to combine; and in the last resort competition and combination were incompitable. Individualism was yielding to monopoly, where strange things might well be done in the name of liberty. The background of Law, social, political and economic has changed. Laissez fair as an ideal has been supplanted by social security and social security suggests status rather than contract<sup>46</sup>.

Horizons of change in socio-legal outlook came to witness. Law is no longer treated as a police<sup>47</sup> but a positive instrument for the achievement of well being of the people through Justice. The moral principle that one should abide by one's agreements and

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44. In France standard form contracts are known as contracts of adhesion, see *Amos & Walton, Introduction to French Law* (2nd ed 1963) at 152. Linhoff calls them compulsory contracts, see *scope of Compulsory Contracts Proper*, (1943) 43 Col L. R. 586.

45. Per lord Diplock, *schroder Music publishing co ltd v. Macanly* (1974) 3 All. ER 616 at 624.

46. Cheshire, Fifoot and Furmstons, *Law of contract* (12th ed) at 19.

47. Holland. T E, *The Elements of Jurisprudence* (13th ed 1924).

fulfil one's promises is being increasingly met by another moral principle namely, that one should not take advantages of an unfair contract which one has persuaded another party to make under economic and social pressures<sup>48</sup>.

Without overtly replacing the shibboleth of freedom of contract, the twentieth century witnessed increased intervention of both, judiciary <sup>49</sup> and legislature <sup>50</sup> on behalf of the consumer.

#### **Privity of contract:**

The doctrine of privity of contract means that a contract cannot as a general rule, confer rights or impose obligations arising under it on any person except the parties to it<sup>51</sup>. The origin of the doctrine is shrouded with uncertainties<sup>52</sup>.

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48. Supra note 39 at 11.

49. Courts in order to mitigate the rigour of exemption clauses have evolved various rules eg. Contra proferentem rule, theory of fundamental breach, reasonableness of the exemption clauses. For an academic treatment on these rules see A.G.Guest, Fundamental Breach of Contract (1961) 77 LQR 98 at 99; Gower Exemption Clauses; Contractual and Tortious liability (1954) 17 MLR 155; Linhoff, The Scope of Compulsory Contracts Proper, (1943) 43 col LR 586.

50. Unfair Contract Terms Act, 1977 was passed in England. Now no party can by reference to any terms of the contract exclude or restrict liability for death or personal injury resulting from negligence. However no such Law has been passed in India. The Trade Description Act, 1968, makes it an offence to offer goods for sale in false or misleading language.

51. G.H.Treital, Law of Contract, 4th Ed p 419.

52. For a detailed discussion see Contracts for the Benefit of Third parties. 12 Int. Comp. L. Quar-318; Promise Without Consideration and Third party Beneficiary in American & English Law 15 Int. Comp. L. Quar 835.

It is often linked with consideration<sup>53</sup>. But its dichotomy<sup>54</sup> suggests that the rule will stand even in absence of the consideration<sup>55</sup>. There may be several reasons for the reception of this common Law rule. One possible reason may be that it is unjust to allow a person to sue on a contract on which he could not be sued<sup>56</sup>. Second possible reason is that if third parties could enforce contracts made for their benefit, the right of contracting parties to vary such contract would be unduly hampered<sup>57</sup>.

The concept of privity bears some significance where the transactions are of commercial nature, i.e. When the buyers and sellers are merchants and they enter into the transaction with approximately equal strength<sup>58</sup>. But it does not suit to consumer sales. It often happens in such sales that one member of the family purchases goods and whole family consumes it. The doctrine of privity will preclude the family members from

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53. S.S.H. Azmi, Sale of Goods And Consumer protection (1992) at 164.

54. However, there are writers who consider privity of contract and privity of consideration as the two different ways of saying something. See Smith & Thomas; A Case Book on Contract (8th ed) P 213; see also Salmond and Williams; The law of Contracts PP. 99-100.

55. Cheshire, Fifoot and Furmston in Law of contract (12 ed) at 78, opines that it is true if the doctrine of consideration were abolished, the problem of privity would remain, as it still remains in other legal systems.

56. Tweddle V. Atkinson (1861) 1B & S at 398.

57. Supra note 51 at 420.

58. Jolowic J.A. The Protection of the Consumer and Purchase of Goods under English Law 32 M L R. 170.

enforcing any claim in the court of Law, as the rationale is that they have only availed or consumed but have not purchased them. From the consumer's point of view, the requirement of privity of contract appears to be very unfortunate. This doctrine came under scathing attack in *Lockett V. AM Charles*<sup>59</sup> Ltd., when it was observed that it is really very strange that the plaintiff's right to sue a hotel keeper for having supplied poisonous food, should depend, in absence of negligence, on the fact whether she herself is paying for it or her host. In two celebrated cases, *Donoghue V. Stevenson*<sup>60</sup> and *Grant V. Australian Knitting Mills*<sup>61</sup> no remedy was available to the consumers for their injuries. In former case, plaintiff who was injured by the contaminated ginger beer was not himself a buyer but only consumer. But in latter case, although plaintiff was himself a buyer of underpants which caused dermitites, the seller had delivered the goods in the original form as received by him from the manufacturer, because the effectual remedy available was against the manufacturer in tort on the grounds of negligence and no remedy was available to the consumer/buyer because of the privity rule. Absence of negligence in addition to lack of privity may mean that no remedy at all is available to the injured consumer. This is what actually happened in *Bucklay V. Reserve*.<sup>62</sup>, when the plaintiff suffered

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59. (1938) 3 all. ER. 170.

60. (1932) AC 562.

61. (1936) A C 85, 104.

62. (1959) C L Y 1330.

illness caused by eating snail in the restaurant. The plaintiff's claim was dismissed because of the privity rule as he was the guest of the actual buyer who had paid for the dinner. As negligence was not alleged on the part of restaurant, the third party had no claim in tort either<sup>63</sup>.

These traditional doctrines of common law namely, caveat Emptor, freedom and sanctity of contract and privity rule were reflections of the then existing state of values and norms. Even today the spirit of these doctrines holds good. There are no two opinions about the fact that the promise once made must be fulfilled or where person has himself inspected the goods he should blame none but himself in case of any defect or Justice demands that only the parties to the contract must be entitled to or liable under the contract. However, the developments of twentieth century has proved that these catch phrases of past have outlived their utility. The market structure of the past has undergone a sea change which the propounders of these doctrines might not have envisaged. The modern paradigms of marketing have proved that these doctrines if implemented in letter and spirit, will prove harsh to consumers. The complex nature of the goods hardly provides any scope for an ordinary consumer to detect the defect while inspecting the goods. The aggressive advertising campaign has also added to the confusion of the consumers in making choice. Thus need to provide a new legal mechanism free from the

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63. See for detailed analysis of undesirability of the doctrine of privity rule, Supra note 53.

doctrines which have outlived their utility to cope-up with the arsenal of unscrupulous traders bent to bilk the consumers was felt. As the Australian Attorney General puts it:

The marketing of goods and services is conducted on an organised basis and by trained executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. Thus consumer needs protection by Law<sup>64</sup>.

### US Reflections:

The common law doctrines were venerated and received with full enthusiasm by American courts during their early stages of development of Law. In the eighteenth and nineteenth centuries the American courts strictly followed the doctrine of **caveat Emptor** which regulated the relationship between the buyer and seller in the market place. In an era of unbridled individualism, denial of freedom of contract either to the buyer or the seller, irrespective of the circumstances in which it was concluded would have been in-conceivable<sup>65</sup>. The rule of privity of contract laid down in *Winter-bottom V. Wright*<sup>66</sup> by the British Courts in which the driver of a defective coach could not recover damages from the manufacturers on the ground of privity of contract, was meticulously followed by the American courts.

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64. Senator Murphy, the then Attorney General while introducing the Trade practices Bill of the common wealth of Australia in the Senate -- Quoted from John Goldring Consumer Protection and Trade practices Act, 1974-5'6 Federal L Rev. at 288.

65. D.N. Saraf, Consumer Protection Law in India (1990) at 4.

66. (1842) 10 M & M 109, 152 ER 402.

Present consumer movement of America is largely accredited to the farming community and honest businesses. The impetus behind the movement for the earliest legislation gathered strength during the 1870's and 1880's. The farmers could not fail to mark the contrast between the rapidly falling prices which they received for their produce and the relatively sticky prices of the goods which they needed to buy. The farmer lost both as buyer as well as seller. The price which the farmer received for the commodities he sold, seemed to him to have been fixed by those to whom he sold, so also he felt that the price of his supplies was fixed by those from whom he bought <sup>67</sup>. The explanation was found in the trust or monopolies. Since the farmers were better endowed with the political influence so they influenced the congress and the result was the Sherman Act, 1889 which declared such trusts unlawful<sup>68</sup>. Although the Sherman Act, 1889 to a great extent curbed the formation of trusts which distorted or hampered competition, nevertheless, experience showed that there were several monopolistic and restrictive trade practices to which the Act did not reach. In order to remove these infirmities, Clayton Act, 1914 was passed. This Act declared, price

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67. Solon J Buch, The Granger Movement, Harvard University press, 1913 C F A.D Neale, The Anti Trust Laws of the U.S.A. (2nd ed) at 13.

68. Section 1 of the Act declares: Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal..., Section 2 says Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with the foreign nations, shall be deemed guilty of a misdemeanour.....

discrimination,<sup>69</sup>, exclu-sive dealing<sup>70</sup> and tying agreements<sup>71</sup> acquisition of competing companies<sup>72</sup> and interlocking directors,<sup>73</sup> illegal. However there was no provision to deal with the unfair trade practices. For instance in *American wash Board co. v. Saginaw Mfg co*<sup>74</sup>, the manufacturers of Aluminum Wash board sought to enjoin the false representation that a competing Zinc board was made of aluminum, the Federal Court held that absent any evidence of "passing off", such a misrepresentation could not be restrained. Thus the defendant could not be restrained from deceiving the public by selling a board not made of aluminum, although falsely branded as such, being infact a board made of zinc material. In *Standard Oil Co v. United States*<sup>75</sup>, the US Supreme Court confined the role of the Sherman Act by holding that only unreasonable contract in restraint of trade would be held unlawful under the Sherman Act. Within hours after this pronouncement, Senator, Frances G. Newlands proposed that congress should constitute an administrative tribunal similar to the Interstate Commerce Commission, over interstate transportation<sup>76</sup>. Thus the Federal Trade Commission Act, 1914 was passed.

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69. Section 2

70. Section 3

71. Section 7

72. Section 8

73. 103 F 281,50 LRA 609 (C.C.A.6th.1900)

74. 221 USI (1911).

75. Cong REC 1225 (1911).

76. 51 Cong REC. 11084 (1914) (Senator Newlands)



The original bill gave the commission a purely advisory role, but a specific provision to control unfair competition was subsequently inserted in section 5 of the Act and the agency was given the power to issue cease and desist orders, against violators. Since unfair competition at common Law had been limited to the substitution of goods of one producer for those of another, section 5 was amended to declare unlawful "unfair methods of competition". Thus the framers apparently anticipated that the commission would move against abuses not yet contrived as well as those that occasioned the statute. One supporter of the legislation noted with prescience the merits of elasticity<sup>77</sup>.

Unfair competition, Like fraud is a creature of protean shapes. It assumes one attitude to day and another tomorrow. As with fraud, so it will be with unfair competition. In fraud there is a constant race between rogue and the chancellor. In unfair competition there is going to be a constant race between the corporation and the commission.

The spirit of congress was not taken into account by the US Supreme Court while interpreting section 5 of the Act<sup>78</sup>.

In its 1935 Annual Report, the commission recommended that section 5 be amended so as to specifically prohibit not only unfair methods of competition in commerce but also unfair and

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77. 51 Cong. REC 11598 (1914) (Senator Thomes)

78. For instance, in *FTC V Gratz* 253 US 421 (1920) The US Supreme Court held that the words Unfair methods of competition are not defined by the statute and their exact meaning is in dispute. It is for the courts and not for the commission, ultimately to determine as a matter of Law what they include. They are clearly in-applicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression .

deceptive acts and practices in commerce<sup>79</sup>. Thus wheeler-lea Amendments to FTC Act were made in 1938<sup>80</sup>. These amendments extended jurisdiction of the commission to cover unfair or deceptive acts or practices in commerce regardless of whether such conduct injured competitors or consumers. Secondly, these amendments gave the commission power to have an effective control over false advertisements of goods, drugs, cosmetics and therapeutic devices. These amendments laid the foundation of modern consumer movement in America<sup>81</sup>. In 1973 FTC Act was amended by the Trans-Alaska oil pipeline Act. Three important changes were made in the original Act. First, commission was empowered to seek injunctive relief in Federal Court for violation of any Law within its Jurisdiction<sup>81a</sup>. Second, commission was authorized to represent itself in Federal Court by its own attorneys if after ten days notice the court action desired by the commission was not taken by the justice Department<sup>82</sup>. Third, increased maximum

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79. 1935 FTC ANN. REP. 14 see also 1936 FTC ANN REP 16-17.

80. The Immediate provocation of passing of wheeler-Lea amendments was the ruling of US Supreme Court in the landmark case of FTC V. Raladam Co, 283 Us 643 (1931). It was held that the commission lacked jurisdiction to proceed against false advertising without the proof that the advertisement adversely affected competitors even though it admittedly deceived the public.

81. According to Loyett these amendments marked the first real departure from the tradition of caveat Emptor in consumer contract administration. See Loyett; State Deceptive Trade practices Legislation 46 Tul. L. Rev. 724, 728 (1972).

81a. Section 408 (f).

82. Section 408 (d)

civil penalty for violation of commission's cease and desist orders from \$ 5,000 to \$ 10,000<sup>83</sup>.

The Federal Trade commission was armed with more powers by the enactment of the Magnusm-Moss Warranty-Federal Trade Commission Improvement Act. This amendment popularly known as FTC Improvement Act has expanded jurisdictional reach of the commission to matters in or affecting commerce, confirms the commission's authority to promulgate trade regulation, rule defining Unfair or deceptive acts or practices, gives the commission an authority to represent itself in court proceedings and makes clear that the commission's investigating authority extends to persons, partnerships and corporations, instead of only corporation as in the past<sup>84</sup>.

Commenting on the Federal Trade Commission's powers to protect consumers J Collier says, the consumer redressal provisions clearly mean money out of the pockets of corporate offenders and in many cases money into the pockets of consumers<sup>85</sup>.

#### Indian Perspective:

As British were the past colonial masters of this whole subcontinent, the whole body of the commercial legislation was replica of English Enactments, so there was every reason to

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83. Section 408 (c)

84. For detailed analysis of these amendments see Earl. W. Kintner & Christopher Smith, "The Emergence of The Federal Trade Commission As A Formidable Consumer Protection Agency." Mercer. L. Rev. Vol 26, 1975 at 69.

85. Wall Street Journal, Jan 20. 1975 at 12 col. 2.

follow the canons of interpretation evolved and developed by the English courts. It is only after independence, that our legislators while thinking independently began to feel the inadequacy of Laws protecting consumer's interest<sup>85a</sup>.

With the adoption of Constitution in Nov. 1949, the aspirations of the people of India found an explicit expression in the preamble, fundamental rights and directive principles of state policy. The Constitution establishes a welfare state. We the people of India gave the Constitution unto ourselves to secure socio economic and political justice<sup>86</sup>. This objective of economic justice is the generic philosophy of which the consumer protection is a constituent element. It is in this generic sense of "We the people" that the term consumer is visualised by the Constitution. A 20th century Constitution of an exploited and under developed country could not afford to espouse a *laissez-faire policy*<sup>87</sup>.

Art. 14 of the Constitution of India guarantees equality before law to all persons. Therefore, producers, sellers and consumers are all equal before law either for receiving reward or punishment. Further, Article 14 guarantees equal protection of

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85a. The major legislations controlling anti consumer practices prior to independence were; The Indian Penal Code 1968, The Sale of Goods Act, 1930 and The Drugs and Cosmetics Act, 1940.

86. Preamble to the India Constitution.

87. V. P Bharatiya, Consumer Protection : So Much Done Much More To Be Done, Paper presented in a seminar on Consumer Protection through law conducted by the University of Jodhpur in 1989.

laws to all persons. Constitutionally, state is enjoined to pass laws, in order to give protection to consumers against the unscrupulous traders.

Art. 19(1)(g) guarantees a right to all citizens to carry on any occupation, trade or business and Art 301 guarantees freedom of Trade and Commerce. This right however, is subject to the restrictions contained in Art. 19(6) and Art. 304. It has been made clear that the freedom of trade or business does not include trade or business in immoral or criminal activities<sup>88</sup>. So unfair trade practices are outside the constitutional protection.

The Economic Justice, equality of status and equal protection of laws, Freedom of trade, business and the reasonable restrictions on such freedoms are all directly or indirectly aimed at what we term in modern context, as consumer protection. To achieve this, state is directed to promote the welfare of the people by securing to them justice, social, economic and political to minimise the inequalities in income, status, facilities and opportunities<sup>89</sup>, to secure to the citizens their right to an adequate means of livelihood to see that the ownership and control of the material resources of the community are so distributed as to subserve the common good, to ensure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment, to make

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88. *State of Bombay v. RM.D Chamar Bauswalla* (1957) SCR 874.

89. Art. 38.

available to both men and women equal pay for equal work, to protect human beings from exploitation on account of sex or tender age, to ensure that they are not forced by economic necessity to enter in a vocation unsuited to their age or strength<sup>90</sup>. The state has to make effective provisions for securing right to work, public assistance in cases of unemployment, old age, sickness and disablement<sup>91</sup>.

The state has also to endeavour to secure to the workers a living wage, a decent standard of life and full enjoyment of leisure, to provide free education for children<sup>92</sup>. Promote with special care the educational and economic interests of the weaker sections and protect them from all forms of exploitation<sup>93</sup>.

The state shall take into consideration the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and to introduce prohibition of the consumption of intoxicating drinks and of drugs injurious to health<sup>94</sup>. For the raising of the nutritional standard and public health, the organisation of agriculture and animal husbandry on modern and scientific lines is also recommended to the state<sup>95</sup>, as also the protection and

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90. Art. 39.

91. Art. 41.

92. Art. 45.

93. Art. 46.

94. Art. 47.

95. Art. 48.

improvement of the environment<sup>96</sup>. Thus a constitutional duty is imposed on the state to protect consumers from the manipulative economics indulged in by the business tycoons and state is enjoined to formulate its policies in such a way as to ensure maximum possible benefits to the consumers.

After independence, many laws preventing unfair trade practices have been enacted by the Indian Parliament<sup>97</sup>, their scope is however, limited. They deal separately with the various dimensions of the unfair trade practices. Since the present study is concerned with the unfair trade practices as covered under the Monopolies And Restrictive Trade Practices Act, 1969<sup>98</sup>, and Consumer Protection Act, 1986<sup>99</sup> so the *raison de'-etra* of the two enactments is outlined here.

Immediately after independence, big houses surreptiously began to accumulate more and more wealth as there was no legal mechanism to control this. They tried to control market by

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96. Art. 48 A.

97. These are : The Drugs Control Act, 1950; Indian Standards Institution (Certification Marks) Act, 1952 (since repealed); Drugs And Magic Remedies (objectionable advertisement) Act, 1954; Prevention of Food Adulteration Act, 1954; Essential Commodities Act, 1955; Trade And Merchandise Marks Act, 1958; Monopolies And Restrictive Trade Practices Act, 1969; Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975; Standard of Weights and Measures (Enforcement) Act, 1985. The Bureau of Indian Standards Act, 1986 and the Consumer Protection Act, 1986.

98. Hereinafter referred to as MRTP Act.

99. Hereinafter referred to as CP Act.

employing monopolistic and restrictive trade practices. In order to ensure that the economic power does not remain in the hands of few individuals or groups of business houses, it was thought advisable to make a thorough enquiry to see the actual functioning of the market forces. Jawahar Lal Nehru, the then Prime Minister while moving draft of third plan in parliament remarked<sup>100</sup>:

.....An advance in our nations income and in our per capita income has taken place and I think it is desirable that we should enquire more deeply as to where this has gone.

Accordingly on October 13, 1960 an expert committee under the chairmanship of Prof. Mahalonabis was set up which submitted its report in 1964. This committee found that despite all countervailing measures taken, concentration of economic power in the private sector, is more than what could be justified on functional grounds<sup>101</sup>. In pursuance of the recommendations of this committee, Government of India appointed in April, 1964, the Monopolies Inquiry Commission (MIC) which submitted its report on 31.12.1965. Monopolies Inquiry Commission suggested inter alia that an independent statutory body known as MRTP commission be established<sup>102</sup>. In order to give effect to the recommendations of the MIC, MRTP Act, 1969 was passed and it came into force from

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100. On 22. 08. 1960.

101. Report of the Committee on the distribution of income and levels of income Part I (1964), P. 1.

102. Monopolies and Inquiry Commission Report (1965) 139.



1st. June, 1970. This Act thus was primarily aimed at preventing concentration of economic power, monopolistic practices and restrictive trade practices. However, Unfair Trade Practices were not covered by the Act. With the passage of time, in the implementation of the MRTP Act, certain problems were encountered and several obscurities and Lacunae were also noticed in the provisions of the Act. So Government appointed a high powered expert committee (popularly known as Sachar Committee)<sup>103</sup> for reviewing the provisions of the Act. With reference to unfair trade practices, the Sachar Committee made following observation:

Our MRTP Act at present contains no provision for protection of the consumers against false or misleading advertisement or other similar unfair trade practices. The Act at present is directed against restrictive or monopolistic trade practices. These provisions proceed on the assumption that if dealers, manufacturers or producers can be prevented from distorting competition, the consumers will get fair deal. But this is partly true. There is now greater recognition that consumers need to be protected, not only from the effect of restrictive practices but also from the practices which are resorted to by the trade and industry to mislead or dupe the customers<sup>104</sup>.

The Sachar Committee pointed out that unfortunately our Act is totally silent on this aspect. The result is that the consumer has no protection against false or deceptive advertisements. Any misrepresentation about the quality of a commodity or the potency of a drug or medicine can be projected without much risk. This has created a situation of a very safe heaven for the suppliers

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103. Vide notification no 50 1981 dated 30-5-1981.

104. Report of the High Powered Expert Committee on Companies and MRTP Acts (August 1978) at 262.

and a position of frustration and uncertainty for the consumers. Therefore, it should be the function of any consumer legislation to meet this challenge specifically<sup>105</sup>.

*Keeping in view the recommendations of the Sachar Committee, Parliament amended the MRTP Act in 1984 and a new chapter on unfair trade practices was incorporated in the Act. The Committee proposed various unfair trade practices to be enumerated in the definition and with some exceptions, be punishable as an offence. Any person or undertaking indulging in any of them be liable to be prosecuted before the commission*<sup>106</sup>. However, this suggestion has not been accepted by the Parliament for the reason that these provisions are comparatively recent in origin and proper administrative machinery has to be geared up to track down the violations throughout the length and breadth of the vast country, they are regulated by issue of prohibitory orders and orders for payment of compensation for loss or damage suffered by the consumer and punishment by way of imprisonment enjoined upon only if those prohibitory orders are violated<sup>107</sup>. A modified definition of Unfair Trade practice was incorporated in the MRTP (Amendment) Act, 1984<sup>108</sup>. The definition had six parts. First part governed the rest five parts which covered, false and misleading advertisements, bargain offers, offering of Gifts, prizes and conducting

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105. Id at 263

106. Id at 272

107. Lok Sabha Debates. MRTP (Amendment) Bill 1984 vol (48) May 7 at 412.

108. See Supra note 104 at 270.

of lotteries and contests, supply of goods hazardous to life and property and hoarding and destruction of goods.

The main part of the definition which governed the rest, was as under:

In this part, unless context otherwise requires, Unfair Trade practice means a trade practice which for the purpose of promoting the sale, use or supply of any goods or for the provision of any services, adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise .....

This original definition was rigid and applicable to only those practices which were enumerated in the definition itself. In order to provide flexible definition <sup>which</sup> will cover not only unfair trade practices which have been expressly mentioned but also those to be contrived, this definition was amended in the year 1991 and flexible definition was provided which is almost similar to the one provided in section 5 of the American Federal Trade Commission Act, 1914 as amended by the Wheeler Lea Amendment Act, 1938.

For the better protection of the interests of consumers, the parliament passed the CP Act. The definition of the Unfair trade practice provided under the MRTP Act was bodily lifted and incorporated in the CP Act. However, the remedies available under the two Acts are different. Under the CP Act, remedies available are cheap. The procedure applicable is simple and free from technical juggernauts and time is provided within which decisions should come. The remedies available under the two Acts are different. However, some common remedies are also provided. The CP Act

provides establishment of three tier quasi judicial bodies at District, State and National level. Where it is found necessary, more than one district forum can also be instituted. In the district forum a complaint of the value of 5 lakhs can be filed, more than five lakhs but less than 20 lakhs is the jurisdiction of the State Commission and more than that falls in the jurisdiction of the National Commission.

# ***Chapter III***

## **DEFINITION OF UNFAIR TRADE PRACTICE**

Like advancement in Science and Technology, a palpable advancement in the Paradigms, techniques, designs and methods of fraud and dishonesty with a view to bilk consumers came to notice. Consumers who are generally ill informed, ignorant and inexperienced, most often than not fall in the trap of unscrupulous traders who by their garrulity and glib coax successfully consumers to purchase unwanted goods. In order to protect consumers, a rapid increase in the recent past came to witness in the volume of legislation against not only fraud and dishonesty in commercial transactions but also against false or misleading advertisements, oppressive bargains and dangerous products. This regulation of unfair business practices is based on twin principles of curbing directly injurious practices which are caused by the imbalance in bargaining power between the parties or indirectly by restraining unfair competition and thereby ensuring high quality goods at lower prices<sup>1</sup>.

The Monopolies and Restrictive Trade Practices Act, 1969<sup>2</sup> until 1984 had power to prevent monopolistic and restrictive trade practices only and there was no provision to tackle the unfair business practices. The rationale was that if dealer, manufacturer or producer can be prevented from distorting competition, the consumers will get fair deal<sup>3</sup>. However, this proved

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1. Cayne and Trebilcock, Market Consideration In The Formation Of Consumer Protection Policy, 23 U.Toronto LJ. 396, 1973.

2. Hereinafter referred to as the MRTP Act, 1969.

3. Report of the High Powered Expert Committee on Companies and MRTP Acts popularly known as Sachar Committee's Report, 1978 at 262.

partly true. Thus in order to curb unfair business practices, parliament on the recommendations of the Sachar Committee inserted a chapter on unfair trade practices in the MRTP Act<sup>4</sup> to bolster and supplement the law relating to restrictive Trade Practices<sup>5</sup>.

Section 36-A of the MRTP Act defines unfair trade practices and similar definition of unfair trade practices has been provided in the Consumer Protection Act<sup>5a</sup>.

**Definition of Unfair Trade Practice:**

The first part of this definition runs as under:

In this part, unless context otherwise requires, unfair trade practice means a trade practice which for the purpose of promoting sale, use or supply of goods or for the provision of services, adopts any unfair method or unfair or deceptive trade practice...

Further, clauses (1) to (5) of section 36-A of the MRTP Act and section 2(r) of the CP Act cover various forms of unfair trade practices such as false representation; bargain sale; offering gifts and conducting of promotional contests; supply of products which do not comply with the safety standards; and hoarding and destruction of goods.

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4. Gazette of India Text 22 Dec., 1984 part I Ind Sec 2 (No.54) at 37.

5. However, preamble to the MRTP Act was not amended to reflect this change. See T.N Pandey; Inadequacies in the Bill. The Economic Times (New Delhi) P 11, 1984.

5a. Herein-after referred to as the CP Act.

The first part of the definition makes it clear that the existence of trade practice is necessary for sustaining charges under section 36-A of the MRTP Act or under section 2(r) of the CP Act<sup>6</sup>. This Trade Practice means a practice relating to carrying on of a trade<sup>7</sup> and trade means any business; industry, profession or occupation relating to the production, supply, distribution or control of goods and includes the provisions of any service<sup>8</sup>. However, there were no definitions of "Trade practice" and "Trade " provided under the CP Act. It is suggested that the definitions of these two expressions be also provided in the CP Act to avoid any ambiguity.

The second ingredient of the definition is that the objective of the trade practice must be the promotion of sale, use or supply of goods or services. It is immaterial whether due to such promotion sale did go up or not<sup>9</sup>.

The words "sale", "use" or "supply" used in the definition are of wide connotation. The word "use" is concomitant result of sale or supply. If trader promotes use of the goods or services, he in fact promotes sale or supply of those goods or services. Thus there is an obvious reason to include "use" within the confines of the definition.

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6. Surya Scooters P V. Greaves Cotton & Co (1993)3 Comp CJ 283.

7. See Section 2 (v) of the MRTP Act.

8. Section 2 (s).

9. Oswal Agro Mills ltd. In the matter of UTPE No.25 of 1985, decided on 27th March, 1987.



The word "supply" is much wider than the "sale" and includes transaction by which goods are leased or supplied under the hire purchase arrangements.

The definition prohibits promotion of goods or services by employing unfair method or unfair or deceptive practice. However, it is not clear whether this prohibition applies to only existing goods or also to future goods<sup>10</sup>.

M RTP Commission in *Surya Scooters (p) v. Greaves Cotton & CO*<sup>11</sup> observed:

That before there can be any trade, there must be some goods with respect to which any trade or business or industry can be carried on or run. There can be no trade practice if there are no goods.

The above opinion of the MRTP commission is based on the ground that the goods mean as defined in the Sale of Goods Act and includes among other things products manufactured, processed or mined in India. The words used here are "manufactured, processed or mined " which in the present context imply, goods which have been already manufactured, processed or mined and not which will be manufactured, processed or mined.

It is submitted that the observation of the MRTP Commission is not based on correct interpretation of the term "goods"

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10. Future Goods have been defined as those goods which are not both existing and identified. A purported present sale of such goods operates as a contract to sell UCC 2-105 (2).

Section 6 of the Sale of Goods Act, 1930 defines future goods as those goods which have been agreed to be produced or manufactured or procured by the seller.

11. Supra note 6.

and has overlooked the history behind the amendment made to goods which resulted in the incorporation of the words "products Manufactured, processed or mined in India".

The original definition of the goods in the MRTP Act<sup>12</sup> was defined with reference to the sale of Goods Act, 1930. This definition was amended in the year, 1984 on the recommendations of the Sachar Committee. The Committee made following pertinent remarks:

The existing definition of goods does not cover the case of investment companies dealing in Stocks and shares and other activities like mining or processing eg. fish and animal products which are not covered under the definition of goods in the Sale of Goods Act. Many Investment companies maintain that they are not undertakings within the meaning of the Act as the existing definition of Goods would not include dealings in stocks and shares. In order to put matter beyond doubt, We would therefore, recommend that the definition of the goods should be revised... The proposed definition would run as follows:-

"Goods" means goods as defined in the Sale of Goods Act (ACT III of 1930) and Includes products manufactured, mined or processed in India<sup>13</sup>.

Thus it is amply clear that the object of incorporating an additional clause in the definition of the "goods" was not to restrict it to only those goods which have been already manufactured, processed or mined but the purpose of this amendment was as mentioned by the Sachar Committee.

The definition of the "goods" taken as a whole reads:  
Goods means as defined in the Sale of Goods Act, 1930 (3 of 1930) and includes:  
i) Products manufactured, processed or mined in India.  
ii) ....

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12. Section 2(1) of the CP Act defines goods still with reference to the Sale of Goods Act, 1930.

13. Supra note 3 at 240.

The manner of construing an inclusive clause and its widening effect has been explained in *Dilworth v. Commissioner of Stamps*<sup>14</sup> and has been followed in a series of cases<sup>15</sup> in India, it has been laid down:

"include" is very generally used in order to enlarge meaning of the words or phrases occurring in the body of the Statute, and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the definition clause declares that they shall include".

Thus clause (1) cannot limit the operation of the main definition but has definitely widened the scope of the main definition by virtue of the word "includes".

If the interpretation of the commission given in *Surya Scooters* is taken as the correct proposition of law, then two practical difficulties will crop up.

Firstly, where for example a company whose goods are still in the manufacturing stage falsely advertises that the goods are of particular quality and discontinues the advertisement when goods are actually thrown open in the market. Then a consumer who purchases goods in pursuance of the advertisement, will get no compensation for any loss or injury as the goods were not in existence at the time when advertisement was made.

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14. 1899 AC 99

15. *Regional Director Employees State Insurance Co. v. Highland Coffee Works of PFX. Saldentia and Sons and another*, 1991 (3) SCC 617; *CIT AP v. M/S Taj Mahal Hotel Secunderabad*, 971 (3) SCC 550; and *the State of Bombay and others v. The Hospital Mazdoor Sabha and others*, AIR 1960 SC610; *Lucknow Development authority v. MK Gupta*, 1994 SCJ. 103.

Secondly , if the view that the goods must be in existence at the time when representation was made is upheld then the same test must be applied to "services" also. Since services unlike goods have no permanent existence and may be regarded as being inchoate until they are actually supplied<sup>16</sup>, it will be difficult to apply the Act to a representation, for example, the quality of services which have not at the time the representation is made, actually been supplied<sup>17</sup>. The stand of the Australian courts is that where a person makes a statement in an advertisement about the quality of service that he is offering, it will be read in the advertisement as containing not only a promise that service of that quality will be provided to those responding to the advertisement, but also statement of fact that the service which the advertiser is currently offering or providing (or has in the past provided) to his customers is of the stated quality<sup>18</sup>, and where it is not possible on facts, says Hartnell<sup>19</sup>, it may well be possible to imply a representation of the fact concerning the advertiser's intention as to the future or ability to provide services of the quality promised<sup>20</sup>. It is therefore submitted that where a representation is made regarding the goods not in existence, the approach adopted should be to

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16. Hartnell, "Consumer Protection Provisions Of The Trade Practices Act", (1979) 53 ALJ 544.

17. Ibid.

18. Henderson V. Poiner Homes Pvt (1980) 29 ALR 597.

19. Supra note 16.

20. Id at 550.

read an intention on the part of the advertiser that when goods will come into existence, they will be of stated quality etc and of course a person will get remedy only when goods come into existence but devoid of the represented quality.

The application of the MRTP and CP Acts to shares and debentures was time and again debated before the MRTP commission and redressal agencies. The term goods has been defined under these Acts with reference to Sale of Goods Act, 1930<sup>21</sup> and shares and stocks are expressly mentioned in that definition<sup>22</sup>. However, that definition is silent on the shares before allotment. The supreme court in *Gopal Jalan and co v. S E Association*<sup>23</sup> laid down that till allotment, shares do not exist and it is only after allotment that they come in to existence. This opinion was also followed by the MRTP commission in subsequent cases<sup>24</sup> and in *Consumer Education Centre v. T T K Pharma*<sup>24a</sup> the Full Bench of the

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21. See section 2 (e) of the MRTP Act and section 2 (1) (i) of the CP Act.

22. Section 2 (7) of the Sale of Goods Act defines goods as every kind of movable property other than actionable claims and money; and includes stocks and shares, growing crops grass and things attached to or forming part of the land which are agreed to be severed before or under the contract of sale.

23. AIR 1964 SC 250.

24. D G (1&R) v. M/S spring steel ltd. UTPE No 457/87; DG (1&R) v. M/s Universal luggage Mfg. UTPE No 7/87; DG (1&R) v. M/s Moser Beer India ltd UTPE 393/87; DG v. M/s Rock land leasing ltd UTPE 44/88; DG (1&R) v. M/s Nagarar June Fertilizers and chemicals ltd UTPE 73/87; DG (1&R) v. Kumanwalia Housing Development finance co ltd (1991) 2 comp. LJ 452, DG (1&R) v. M/s Federal loyal corporation ltd, UTPE 125/86; DG (1&R) v. lohia Machines ltd kanpur (1985) 2 Comp LJ 247; J.P Sharma v. Reliance petro chemicals (1988) 3 Comp LJ 289.

24a. (1990) 68 Comp Cas 89.

M RTP commission went a head by holding that issuing of shares or debentures is a mode of raising capital. Raising capital is making of arrangements for carrying on of any trade. It is just like purchasing furniture or appointing employees which are necessary arrangements for trade but has no connection with the mode or method of carrying on a trade. The definition of trade practice under the M RTP Act makes it clear that it is a trade practice relating to carrying on of any trade and cannot be said that a company is trading in shares when it issues shares to public<sup>25</sup>.

In order to obviate the effect of the above rulings, the M RTP (Amendment) Act, 1991 amended section 2 (c) to the effect that the shares and stocks including issue of shares before allotment would be treated as goods for the purposes of the M RTP Act. However, this amendment has not removed all those flaws which were pointed out by the Full Bench in T T K Pharma i e. the definitions of trade and trade practice have not been amended nor any explanation to this effect has been appended so as to clear the present ambiguity. After this amendment to the definition of goods, the M R T P Commission had an occasion in *Dinesh Gupta v. Reliance polythylene ltd*<sup>26</sup> and

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25. Similar observation was made by the M RTP commission in re oswal Agro fortune limited UTPE No 159 of 1988 comp L Digest vol. X VII No.11. Kamanwala Housing Development Corporation limited UTPE No 218 of 1987 decided on 24.4.1991; Continental Construction limited RTPE No.211/86 decided on 18.11. 1987, Comp L Digest Vol xvii No 11, Ankur Electronics limited, Comp L Digest Vol. xi No.1; UP Electronics corp. v. Union of India C A No. 2690 of 1992 decided on 26.8. 1992.

26. (1993) 1 CTJ MRTPC

**K G v. Skypak Couriers**<sup>27</sup> to deliberate upon a complaint alleging unfair trade practice in relation to issue of shares and convertible debentures. But in neither of the cases the issue of maintainability of the complaint on the ground that the issue of shares does not amount to "trade" and "trade practice" was raised. So the commission decided these cases on merits. In **Sohan Lal M Baldva v N E P C Agro Goods ltd**<sup>28</sup> however, the MRTP commission without making any reference to the controversial issues like the definition of trade and trade practice held that delay in refunding share application money is a case of unfair trade practice as the services were not of the quality as claimed.

On the other hand the definition of goods has not been amended under the CP Act like the MRTP Act. Keeping in view the opinion of the supreme court in **Gopal Jalan**, a complaint in respect of the shares before allotment cannot lie before the redressal agencies. However, without touching to the root of the problem, the Rajasthan state commission in **LC Chandgotya v Northern leasing and Industries**<sup>29</sup> upheld the opinion of the District forum that the stocks and shares are included in the definition of the goods and in **N Maduram Financial services pvt ltdv. Modern woolen ltd**<sup>30</sup>, the Tamil Nadu state commission in order to protect

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27. (1993) 1 C T J 20 MRTPC.

28. (1993) 2 Comp LJ 268.

29. (1991) 2 CPJ 19.

30. (1992) 2 CPJ 756.

the interest of consumer and to escape from the controversy of the definition of Trade and Trade practice held that those who purchase the shares and debentures from the existing share holders and seek the transfer from the company in their name, are persons who have hired services of the company for consideration, the consideration being the value of the shares or debentures and they are therefore, consumers within the meaning of section 2 (1) (d) (ii) of the Act. In between these two opinions, the complainant's counsel in *DR. B S Goba v. Steel Authority of India*<sup>31</sup>, stated that although allotment of shares is not a service, the delay in such allotment will amount to deficiency of service. This plea was not accepted by the commission and held that in a contract of sale of goods simplicitor, mere delay in delivery therefore, beyond the agreed date would not convert it into deficiency of service within the meaning of the Act.

The National commission found opportunity to deliberated on this issue in *Gurdial sing and ors v. united land and Housing ltd and sons*<sup>32</sup> and *Ram Naryana Paramesh Warayar v. Larsen and Toubro ltd*<sup>33</sup>. In Gurdial Singh, issue was relating to sale of shares to complainant with a stipulation for repurchase. The apex commission held that this was purely a transaction of sale of goods and not an agreement of hiring of any service<sup>34</sup>. This proposition

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31. (1991) CPJ 631.

32. 11(1993) CPJ NC 216.

33. (1993)1 CTJ 116

34. Id at 217.



was carried further by the Haryana state commission in *M/S P Fizer ltd v. Hanssai singh*<sup>35</sup> by holding that stocks and shares, being goods, their purchase by investor prima facie is not for consumption or use, but for commercial purpose<sup>36</sup>. In *Ram Naryan Paramesh* the complaint was regarding delay in the delivery of allotment letters to the allottee of the debentures. The National commission without delving on the basic issue held that if the debenture holder had purchased the debentures for resale which he could not effect in the absence of allotment letters, the transaction would become a transaction for commercial purpose and therefore he would not be a consumer. Thus held the debenture holder as the consumer of goods. The commission also held that the consumer forum can consider his claim for compensation under section 14 (1) (d) for any liquidated damages only in case it is established that he has suffered loss due to deficiency in service and negligence on the part of the respondent.

The issue of shares came up before the supreme court also in *Morgan stanly Mutual Fund v. Kartikdas*<sup>37</sup>. The apex court first made it clear that although there is no definition of Trade Practice under the CP Act, yet as per rules, the expression Trade practice shall have the same meaning as provided under the MRTP Act. Then the apex court made the same observation as was made by the MRTP commission in *T T K Pharma*. It was held that the share

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35. 111(1993) CPJ 1721.

36. Id at 1728 See also *Braham Dutta Agarwal v. San Tubes ltd and ors* (1994) 3 CPR 78.

37. 11 (1994) CPJ 7 Sc at 16.

means share in capital. The object of issuing the same is for building of capital. To raise capital means making arrangements for carrying on the trade. It is not a practice relating to carrying on of any trade. Creation of share capital without allotment of shares does not bring shares into existence. Therefore, a prospective investor is not a consumer, nor do have consumer courts jurisdiction in the matters of this kind<sup>38</sup>.

The decision in *Sohan lal M Baldawa* laid down by the MRTP commission was overruled by it in *D G V. Deepak Fertilizer co ltd*<sup>39</sup> in the light of the supreme court's ruling in *Morgan Stanley*. The commission held (1) that the debentures before allotment are not goods under MRTP Act, 1969 and it makes no difference whether the debentures are convertible or ordinary. (2) Even assuming that the debentures are goods even prior to their allotment, no "Trade" or "Trade practice" is involved where the company merely offers the issue for subscription to the public by way of raising capital for its trade or business; (3) it can also not amount to hiring of service.

From the afore discussed case law, it is still not clear as to whether MRTP Act or CP Act applies to shares and debentures. One view is that the shares and debentures before allotment are not goods and even after allotment, company issuing shares cannot be said as trading in them but it is simply a mode of raising capital. This means that the MRTP (Amendment Act) 1991 which

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38. Id at 17 see also *Godrej soaps ltd v sham Sunder Gupta and ors* (1994) 2 C T J 753 (supreme court)

39. (1994) 3 Comp L J 614.

included shares before allotment in the definition of goods, has not changed any position as the corresponding changes in the definition of "Trade" and "Trade practice" have to be made so that shares and debentures before and after allotment are covered and even if these amendments are made, a complaint cannot lie before the consumer redressal agencies as the consumer who purchases the goods for commercial purpose or for resale is excluded from the purview of the CP Act, Another views is to hold it as a service to the consumer and to provide relief in case service is found deficient . It is submitted that the latter approach is more beneficial & in accord with the objectives of the two Acts. If it is hold otherwise, then the investors will be left without any protection as his complaint will neither be covered under the MRTP Act nor CP Act. Such beneficial construction to the CP Act was advocated by the supreme court in *Lucknow Development Authority v. M K Gupta*<sup>40</sup> which will apply mutatis mutandis to the MRTP Act also. It was said:

The provisions of the Act have to be construed in favour of the consumer to achieve the purpose of enactment as it is a social benefit oriented legislation. The primary duty of the court while construing the provisions of such an Act is to adopt a constructive approach subject to that it should not do violence to the language of the provisions and is not contrary to attempted objectives of the enactment<sup>41</sup>

If the above approach is adopted, then there is no need of making any amendment in the two Acts as the word "Financial" is

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40. (1994) SCJ Vol. 1 at 103.

41. Id at 111.

expressly mentioned in the definition of service<sup>42</sup> and services even if of commercial nature, are included in the CP Act. It will not be out of place to mention here that in order to protect investors from the unfair trade practices of the business community, Truth in Lending Act and Financial Services Act, 1986 have been passed in America and England respectively but in India quasi judicial bodies are still groping in the dark to understand as to what constitutes financial service.

The MRTP and CP Acts enjoy the distinction of giving protection not only to consumers of goods but also consumers of services. For this purpose definition of the word "Service" has been provided under the both Acts<sup>43</sup>. It is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. The main clause itself is very wide. It applies to "any service made available to potential users". The word "any" and "potential" are significant. Both are of wide amplitude. The word "any" dictionaryly means "one or some or all" and has a diversity of meaning and may be employed to indicate "all" or "every" as well as "same" or "one" and its meaning in a given statute depends upon the context and subject matter of the statute. The

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42. See S.S.H Azmi; Morgan Stanley Mutual Fund v. Kartic Das : A Critique XI Alig LJ 1996 at 50.

43. Section 2(o) of the CP Act and 2(r) of the MRTP Act defines the term service as : Service means service of any description which is made available to potential users and includes the provisions of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both (housing construction) entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

other word "potential" is again very wide. It means capable of coming into being, possibility. In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all, actual or potential users. But the legislature did not stop here. It expanded the meaning of service further in modern sense by extending it to even such facilities as are available to a consumer in connection with banking, financing etc<sup>44</sup>. In absence of any indication, express or implied, the definition covers services provided by the authorities created by the statute<sup>45</sup>. This definition is wide enough to cover not only services enumerated but also other services which can be read as implied in the definition<sup>46</sup>.

The services free of charge or "under a contract of personal service" are excluded from the purview of the two Acts. The term, "contract of personal service" has not been defined under the act

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44. Supra note 40 at 113.

45. See Indian Medical Association v. V P Shantha & Ors (1995) 11 CPR 412 in which medical services were held to be included in the definition. Similarly education has been held as covered in the definition of service see Oza Nirav Kanubhai v. Central Head apply Industries Ltd. and Ors (1992) 1 CPR 735; Abel Pacheio Graciov v. Principal Bharathi Vidye Peeth 1(1992) CPJ 105; M. Subesh v. Official in charge 11(1992) CPJ 933 and Tilak Raj v. Haryana School Education Board (1991) 2CPR 309.

46. (1992) 2 Comp. LJ 242 See also Cosmopolitan Hospital Authorities & Anr v. V P Nair (1992) 3 Comp. LJ 80.

the Act. However, the National Commission in *Modgi v. Crosswell Tailors*<sup>47</sup> held that there is a well established difference between "contract of personal service" and contract for personal service". The contract of personal service involves a master servant relationship where servant has no discretion but has to follow the directions of the master. In other words, contract of personal service covers a situation where master not only dictates the servant what he has to do but also how he has to do. But in contract for personal service, the master only informs his servant what he has to do and how he will do it is the job of the servant. This distinction was also confirmed by the Supreme Court in *Indian Medical Council Authorities v. V. P. Shantha*<sup>48</sup>.

The present definition of unfair trade practice provided in the MRTP and CP Act, was incorporated through MRTP (Amendment) Act, 1991 and CP (Amendment) Act, 1993 respectively. The unamended definition was restrictive in its scope and was confined to only those unfair business practices which were mentioned in the definition itself. Thus those practices which were not mentioned in the definition, could not be questioned before the MRTP Commission or Redressal Agencies.

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47. Supra note 46.

48. The definition before amendment was as follows : In this part, unless the context otherwise requires, unfair trade practice means a trade practice which for the purpose of promoting sale, use or supply of any goods or for the provision of any services, adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise.

The first para of the amended definition of the unfair trade practice is almost similar to Section 5(a)(1) of the definition provided under the Federal Trade Commission Act, 1914 as amended by Wheeler-Lea Amendment Act, 1938 of United States. This definition runs as follows:

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

Since the words "unfair method and unfair or deceptive practices" are of seminal importance and in fact have to a considerable extent widened the scope and ambit of the definition, neither these words have been defined in any of the two Acts nor have either MKTP Commission or Consumer Redressal Agencies found chance to expound these concepts. So for proper understanding of these terms, exposition of the American courts can be of great help. The words inserted in the amended definition of the Unfair Trade Practice have wide connotation and have potential to embrace the situations not yet conceived<sup>49</sup>. So instead of enumerating the few practices and leaving many, the best possible approach was adopted by inserting the words which can cover any trade practice which can fairly be said as unfair or deceptive. United States Congress stated the reasons for not enumerating the

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49. Commenting on the dynamic nature of original section 5 of FTC Act, Senator Cummins said, "The words unfair competition can grow and broaden and mould themselves to meet circumstances as they arise, just as the words restraint of trade have grown and been moulded in order to meet the necessities of the American people. 51 Cong. REC 1400 3(1914).

specific practices with unusual candour in the Conference Report<sup>50</sup> in the following words:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would at once be necessary to begin over again. If congress were to adopt the method of definitions, it would undertake endless task. It is also practically impossible to define unfair practices so that the definition will fit business of ever sort in every part of the country<sup>51</sup>.

The concepts incorporated in the definition are discussed hereunder:

#### Unfairness Doctrine

In United States after the wheeler-lea Amendment Act, 1938 till, 1972, there was no authoritative opinion as to what constitutes unfair trade practice. In 1964, Federal Trade Commission issued a policy statement popularly known as Cigarette Rule<sup>52</sup>.

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50. HR. Rep. No. 1142, 63 Cong. 2nd Sess. 19(1914) Cf. Earl W. Kintner Christopher Simith, The Emergence of the Federal Trade Commission As a Formidable Consumer Protection Agency, Mercer Law Review 1975 Vol.26, P.656.

51. The senate Committee on interstate commerce Report Endorsing the trade Commission bill voiced same sentiments: The Committee gave careful consideration to the question as to whether it would attempt to define the many variable unfair practices which prevail in commerce and to forbid their continuance or whether it would by a general declaration condemning unfair practices, leave it to commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason, as stated by one of the representatives of the Illinois Manufacturer Association, that there were too many practices to define, and after writing 20 of them in to the law, it would be quite possible to invent others. Ibid.

52. Statement of Basis and purpose of Trade Regulation, Unfair or Deceptive Advertising and labeling of cigarettes in relation to the Health Hazards of Smoking, 29 Fed Reg 8325, 8355 (1964).



The Criteria set out in this rule were apparently approved by the US Supreme Court in *Federal Trade Commission v. Sperry & Hutchinson Co.*<sup>53</sup> which are as follows:

1. Whether the practice, without necessarily having been previously considered unlawful, offend public policy as it has been established by statutes, the common law or otherwise whether in otherwords, it is within at least the penumbra of some common law statutory, or other established concepts of unfairness;
2. Whether it is immoral, unethical, oppressive, or unscrupulous;
3. Whether it causes substantial injury to consumers (or competitors or other businessmen).

This judgment has cast bread on wide waters. The public policy, morality and ethics which are devoid of precise meaning have been declared as a touchstone to label the trade practice as unfair. Although nineteenth century judges tried to crystalize the heads of public policy<sup>54</sup>, yet judicial views inevitably differ upon whether a particular contract is immoral or subversive of the common good, there is no necessary continuity in the general policy of law<sup>55</sup>, for what is anathema to one genera-

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53. 405 US 233, 244-45 n. 5(1972).

54. For instance, a contract of marriage brokerage, unfair or unreasonable dealings, the creation of perpetuity, a contract in restraint of trade, wagering contract are declared as void for being opposed to public policy. For illuminating discussion on public policy see, Winfield, public policy in the English Common Law, 42 Har LR 76-102 (1928).

55. Cheshire, Fifoot and Furmston<sup>ten</sup> law of contract. (12th ed) 1991 at 357.

tion seems harmless to another<sup>56</sup>. So Lord Atkin's words of caution merits highlighting that the doctrine of public policy should only be invoked in clear case in which harm to the public is substantially incontestable and does not depend upon the Idiosyncratic inference of a few judicial minds<sup>57</sup>. Otherwise public policy is a vague and unsatisfactory term<sup>58</sup> and when once you get astride it, you never know where it will carry you<sup>59</sup>. Like public policy, ethics and morality are also dependent on the vagaries of Individual and social outlook. If ethics be termed as ideal pictures of life, individually formed and followed by men and morality as rules or principles governing human behaviour which apply universally within a community or class<sup>60</sup>, then the question is whose ethics and whose morality should determine the character of a trade practice. Since the law relating to trade practices cannot be framed for each individual, community or class separately, should then only those moral principles be gleaned which in the eyes of Hart<sup>61</sup>, are so originally connected

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56. For instance, a contract to hire a hall for a meeting to promote atheism was held contrary to public policy in *Cowan v. Milbourn* (1867) LR 2 Exch-230 but fifty years later this view was rejected in *Bowman v. Secular Society* (1917) A C 406.

57. *Fender V. St. John Mildmay* (1938) AC1 See also *Gherulal V. Mohadeodes* AIR 1959 SC 781.

58. Parke B In *Egerton V. Brown Low* (1853) 4 HLC 1, 123.

59. Atkin J In *Richardson V. Mellish*, (1924) 2 Bing. 229, 252.

60. A.M. Matta, *Moral Values; Religion and the Law: Some observations*, 11: 2 RLR (1993) 178.

61. Hart. H.L.A. *Law, Liberty and Morality* (1963) at 11.

with the central core<sup>62</sup> that its preservation is required as a vital bastion. Again the test is subjective one and will be coloured by the idiosyncrasies of the judges which Lord Atkin so vehemently tried to abjure while deliberating on the public policy issue<sup>63</sup>. There is also no consensus on the extent to which the law should enforce moral values<sup>64</sup>.

Commenting on the *Sperry & Hutchinson* doctrine an Australian writer observes<sup>65</sup>:

The breadth of the American provision seems, on the casual observation of an outsider, to be its greatest asset and (potentially) its greatest failing. On the <sup>one</sup> hand, it is extremely flexible and therefore can be employed in furtherance of almost any regulatory policy. On the other hand, it is startlingly vague. It is clear from the decision in *Sperry & Hutchinson* that the prohibition is not limited to deceptive practices nor confined to activities with antitrust or other economic implications. What then are its limits. In its lack of definition, it runs the danger of becoming a rallying point for an almost infinite variety of causes. Unreasoned application of the standard might ultimately

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62. For Hart in every society there is to be found ... a central core of rules or principles which constitutes it Ibid.

63. Supra note 59.

64. John Stuart Mills opined that coercion can only be justified for the purpose of preventing harm to others. For a discussion on Mill's stand see Smark, 49 Can. Bar. Rev. 188, 197-200. On the other hand Hart extends the role of the law by his acceptance of "Paternalism" in addition to Mills reliance on harmful consequences to others, law Liberty and Morality (1963), at 30-34. Lord Derlin has advocated another extreme by holding that he was not seeking to say that law must automatically punish in the case of offences against morality, but rather there are no circumstances in which you can say that law may not punish in such cases. The listener June 18, 1964 Cf. Lord Lloyd, Introduction to Jurisprudence, (1972) (3 ed) at 53.

65. A.J. Duggan, Fairness in Advertising; In pursuit of the Hidden persuaders, Melb. Ul. Rev. Vol. II June 1977 at 63.

either erode the effectiveness of regula-tory activity or threaten the survival of the activity regulated<sup>66</sup>.

The unfairness doctrine propounded by the US Supreme Court in *Sperry & Hutchinson's* case, was later on applied to a number of trade practices which can be classified as; claims published without reasonable prior substantiation<sup>67</sup>; claims, which tend to reach or exploit particular vulnerable

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66. Similar views were expressed by Robert Pitofsky in his article, "Beyond Nader: Consumer protection And the Regulation of Advertising; He observes: The Supreme Court's broad grant of authority to the FTC to develop new rules in the consumer protection field is too vague to provide any meaningful enforcement guidelines, Har L.Rev.Vol.90, No.4 Feb 1977 at 681. At another occasion the learned author observes: many people are legitimately concerned that the term (Unfairness) is so vague as to be useless in predicting what is legal and so general as to confer on the commission excessive legislative authority... sperry & Hutchinson makes even commissioners wonder about the limits of their authority see Pitofsky in Kirkpatrick; Elman, pitofsky and Baxter, Debate: The Federal Trade Commission under Attack: Should Commission's Role Be Changed? 49 Antitrust L J. 1481,1492 (1980).
67. Previous to Ptizer Inc, 81 FTC 23 (1972), substantiation of claims relating to health & safety was necessary but in ptizer's case this requirement of substantiation was extended even to the claims not relating to health & safety. The rationale of this requirement was held to be that it is impractical to expect individual consumers to run test on the thousands of products they purchase and that it is more efficient for a seller to run test once for each product claim. The consumers are entitled to the substantiation information and should not be compelled to enter into an economic gamble to determine whether a product will or will not perform as represented. Thus unsubstantiated claims that Firestone safety stops 25% quicker (Fire stone Tire & Rubber Co. (1970-73 Transfer binder) Trade Reg. Rep. 320, 112, at 22, 069 (FTC 1973), Vaga is the best handling passengers car ever built. (General Motors Corp et al (1970-73 Transfer binder) 3 Trade Reg.Rep 20747 at 20,600 (FTC 1974), reserve cooling power-only Fedders has this important features Fedders Corp; 3 Trade Reg. RP.S 20,825 at 20691 (FTC 1975) were declared unfair Trade practices. For criticism of this claim substantiation doctrine see Supra note 68 at 683.

groups<sup>68</sup> and instances in which sellers fail to provide consumers with information necessary to make choice among competing products<sup>69</sup>.

#### Unfairness Doctrine : New Approach:

In the process of expanding horizon of the Unfairness doctrine, the Federal Trade Commission of USA proposed in 1978 to regulate advertising on TV programme aimed primarily at children. While these ads were rarely 'deceptive' in the conventional sense, the commission argued that they 'unfairly' took the advantage of susceptibilities of the young viewing audience. By congressional dictate, however this rule making power was aborted in 1980<sup>70</sup>. In the wake of criticism of the children's Advertising

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68. In ITT Continental Baking Co.<sup>83</sup> FTC 1105 (1973), claim that wonder bread helps in dramatic growth of children was held to have exploited the aspirations of children and parental concern for rapid and healthy growth and development id at 872.

69. At one stage commission in *Alberty v. FTC* had opined that an advertisement cannot be said to be misleading if it is not more informative, 182 F 2d 36 (DC Cir) 340 US 818 (1950). But later on commission came with a different opinion. See for instance, non disclosure by the vocational schools of the percentage of enrollers who do not complete the course, the percentage of graduates who do not obtained employment and the salaries and employment of graduates who do obtain job was declared unfair, Lafayette United Corp. (1973-76 Transfer Binder) Trade Reg Rep (CCH) 20,499 (FTC 1974). Similarly failure to declare future land development programmes and failure to state that the purchase price of plots is not all inclusive by promoters was said to be unfair. AMREP. Corp, (1973-76 Transfer Binder) Trade Reg. Rep. CCH 20, 846 (FTC 1975) see also Horizon Corporation (1973-1976 Transfer Binder) Trade Reg. Rep (CCH) 20,845 (FTC 1975) Similarly In re International Harvester co. 104 FTC 949 (1984), ejection of hot fuel in the Harvester's tractors which could result in the serious fires and which was in the knowledge of the Harvester company but did not notify it was held as unfair practice.

70. FTC Act Section 18 (i), USCA Section 57 (a) (i) "The Commission shall not have authority to promulgate any rule in the children's advertising proceeding... On the basis... that such advertising constitutes an unfair act or practice".

Rule proposed in 1978, the Commission issued a policy statement on unfairness in 1980<sup>71</sup> which delineated the implications of the three test criteria laid down in *Sperry & Hutchinsons* (Supra). A resume of this policy statement is here under.

Consumer injury:

The commission in its policy statement laid down that the independent nature of the consumer injury does not mean that every consumer injury is legally 'unfair'. To justify a finding of unfairness the injury must satisfy two tests. It must be substantial. It must not be outweighed by any counter-vailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided<sup>72</sup>. As examples of substantial injury, the statement referred to monetary harm as when sellers coerce consumers into purchasing unwanted goods and services or when consumers buy defective goods or services on credit but are unable to assert against the creditor claims or defenses arising from the transaction or unwarranted health and safety risks. On the other hand, emotional impact and other more subjective type of harm were ordinarily excluded.

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71. The policy statement had a political purpose-to keep congress off from stripping the FTC all or part its power to regulate unfair practices. Infra note 72. This policy statement has no binding effect and could be disregarded or rejected by courts or future commissions.

72. These are excerpts of the letter called FTC's policy statement. For full text of the letter see 4 CCH Trade Reg. Rep. 50,421.

### Violation of Public Policy:

The Second S & H Standard asks in the opinion of the commission whether the conduct violates public policy as it has been established by statute, common law, industry practice or otherwise. This criterion may be applied in two different ways. It may be used to test the validity and strength of the evidence of consumer injury or loss often, it may be cited for a disposition of legislative or judicial that such injury is present. Although public policy was made by Sperry and Hutchinson's case an independent criterion for determining the character of a trade practice, it is used in the opinion of the commission as an additional evidence on the degree of consumer injury caused by specific practices.

To the extent that Commission relies heavily on public policy to support a finding of unfairness, the policy should be clear and well established. In other words, the policy should be declared or embodied in formal sources such as statutes, judicial decisions, or the constitution as interpreted by the Courts; rather than being ascertained from a general sense of national values. The policy should likewise be one that is widely shared and not the isolated decision of a single state or a single court.

### Unethical, immoral or unscrupulous conduct:

Finally, the third *Sperry and Hutchinson's* standard asks whether the conduct was immoral, unethical, oppressive or unscrupulous. The test in the opinion of the Commission was included in

order to be sure of reaching all the purposes of the underlying statute, which forbids 'unfair acts or practices. Only general principles of recognised standards of the business ethics are declared as the yard stick. This test has proven largely duplicative. Conduct that is truly unethical and unscrupulous will almost always injure consumers or violate public policy as well. The Commission has never relied on the third criteria of sperry & Hutchinson as an independent basis for a finding of unfairness and has decided to act in future only on the basis of the first two.

Thus 1980 policy statement of Federal Trade Commission places primary emphasis on Consumer injury which must be substantial, and must be an injury that consumer could not reasonably avoid. Public policy has become a second confirming factor and public morality has been dropped completely<sup>73</sup>. Thus, the unfairness doctrine has lost its original intuitive meaning based on moral considerations, and has become more of a cost benefit analysis<sup>74</sup>. The policy statement of Federal Trade Commission while refining the unfairness doctrine gave more weight to the consumer injury and consumer was burdened with an onus of proof that he was not in a position to avoid this injury a hint at the emergence of *Caveat emptor* approach under which a practice might

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73. John A Spangle et al, Consumer law, cases and materials, American Book Series, 1991 at 65.

74. See generally Averitt the Meaning of "Unfair Acts or Practices". in Section 5 of the Federal Trade Commission Act, 70 Geo LJ 225 (1981) See Also Phillip I. Blumberg; Consumer protection in the United States. Control of Unfair or Unconscionable practices, American Jol of Comp. Law Vol 34 1986.99.



not be considered unfair, despite a significant injury, if consumer could, or should have been more vigilant in avoiding it<sup>75</sup>.

### Deceptive Practices:

The term "deceptive or misleading practice" has found place in various legislations of the world<sup>76</sup> but has proved difficult to ascribe any exact meaning<sup>77</sup>. The term deceptive has been

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75. See for contrary opinion, Jean Braucher, Defining unfairness: Empathy and Economic Analysis At the Federal Trade Practices, Boston. Univ. L. Rev 1988 Vol 68 at 413, wherein the learned author opined that the two major concerns raised by the policy statement; uncertainty about the nature of the cost benefit analysis contemplated and the possibility of the advent of a consumer beware approach, were allayed by the credit practice Rule Analysis, published in March 1, 1984 and which came into force in 1987.

76. For instance see section 5 of the Federal Trade Commission Act, 1914 as amended by the Wheeler Lea Act, 1938, section 52 of the Trade Practice Act, 1977 of Australia, section 33(c) of Combines Investigation Act, 1923 of Canada; Section 3 of the Trade Descriptions Act, 1968 of England.

77. The reason for this difficulty is laid down as under:

The fertility of man's invention in devising new schemes of fraud is so great that courts have always declined to define it, reserving to themselves the liberty to deal with it in whatever form it may present itself. It is better not to define the term, lest the craft of men should find ways of committing fraud which might evade such definition. A. M. Jur 2d Fraud & deceit, 1 at 18 Cf. James D. Jeffries, Protection for consumers Against Unfair And Deceptive Business Mar. Law Review, Vol. 57 No.4 1974 at 595. Following definition of deception has been given by the members of the Federal Trade Commission of USA:

1. An advertisement is deceptive; if it makes a false claim about any material fact;
2. If it produces an inaccurate belief about any material fact in (some) consumers;
3. If it leaves (some) consumers with inaccurate beliefs about any material fact;
4. If it fails to disclose the information that would be optional under the circumstances. See Howard Beales, Richard Craswell and Steven & Salop; The Efficient Regulation of Consumer Information, the Journal of Law and Economics Vol. XXIV (Dec., 1981) at 496.

interpreted to cover misleading statements. In other words, these two terms were considered synonymous<sup>78</sup>. But in Australia a conduct will be proscribed if it is either misleading or deceptive<sup>79</sup>. Thus suggesting the independent requirements for a practice to be declared misleading or deceptive. Nevertheless it is difficult to see any distinction between misleading conduct and deceptive conduct and it will rarely if ever, be necessary to draw any such distinction<sup>80</sup>.

To deceive implies to cause to believe what is false, to lead into error<sup>81</sup>. It means to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false<sup>82</sup>. In United States, courts have not shown unanimity in laying down principles to measure deceptiveness in advertisements. One view is that the likelihood or propensity of deception is the criteria by which advertisement is measured<sup>83</sup> and in the statement of Basis and purpose for the

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78. In *Chrysler Corp v. FTC* 561 F 2d 357 363 (DC Cir 1977) it was held that an advertisement may be deceptive if it has a tendency and capacity to convey misleading interpretation; In *FTC v. Sterling Drug, Inc*, 317 F 2d 669, 674 (2d Cir 1963) capacity to deceive was defined in terms of a likelihood or fair probability that the reader will be misled.

79. Section 52 runs as follows:

A Corporation shall not in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

80. *Taperrell, vermusch and Harland, Trade Practices and Consumer Protection*, 608 Par 1412 (3rd ed. 1983).

81. *Oxford English Dictionary*.

82. *R.C. London & Globe Financial Corp. Ltd* (1903) 1 Ch 728 at 732; See also *weitmann & Katies Ltd* (1977) 29 F LR 336; 2 TPC 329.

83. *Beneficial Corp. v. FTC* 542 F.2d 611 (3rd Cir. 1976).

mine the nature of an advertisement<sup>84a</sup> and in the statement of Basis and purpose for the Funeral Industry Practices Rule<sup>85</sup> defined deception as a practice with the tendency or capacity to deceive a substantial segment of the purchasing public in some material respect . The cigarette Rule was issued in 1964 and Funeral Practice Rule was issued in 1982 but even then there has not been a general trend towards the adoption of the likelihood standard. In some cases the phrases "tendency or capacity" and "likelihood" have been used interchangeable, thus suggesting that these words are synonymous<sup>86</sup>. The word "likelihood" connotes a higher standard of Proof than either "tendency or capacity". There is a difference of degree of probability of deception.

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84. 29 Fed. Reg 8324 (1964). The rule itself was subsequently pre-empted by the cigarette labeling and Advertising Act of 1965, codified at 15 USC (1982).

84a. American Home Products Corp. v. FTC, 695 F 2d 681, 687 (3rd Cir 1982) (misrepresentations are condemned if they possess a tendency to deceive); Chrysler corp. v. FTC, 561 f. 2d 357, 363 (D.C Cir. 1977) (the advertisement had a tendency and capacity to mislead consumers); Mackenzie v. United States, 423 US 827 (1975) (the commission has the expertise to determine whether advertisements have the capacity to deceive or mislead the public); FTC v. Colgate - Palmolive Co. 380 US 374, 391 - 92 (1965) (nor was it necessary for the commission to conduct a survey of the viewing public before it could determine that the commercial had a tendency to mislead).

85. 47 Fed. Reg at 42, 274 (1984).

86. Montgomery ward & Co v. FTC 542 F. 2d 611 (3d. Cir 1976).

Similarly courts failed to come in agreement on the question as to whose intelligence should determine the nature of advertisement. One view is that the FTC possessed a mandate to protect the unwary and foolish members of the buying public as well as the diligent<sup>87</sup>, other view is that the commission may not inject novel meanings into advertisements and then strike them down as unsupported. Advertisements must be judged by the impression they make on reasonable members of the public<sup>88</sup>.

Due to the lack of consistency in the deception elements propounded from time to time, the FTC Chairman Miller mooted a proposal that Congress should amend section 5 to include statutory definition of deception. Congress, however, requested that the FTC should compile a written report outlining the current status of deception enforcement. The commission's response to this request was the 1983 policy statement, which was received with considerable controversy. The commissioners differed on the elements of deception and they used different terminology while attempting to describe it. The majority commissioners defined deceptive advertisement as an act or practice by which consumers if acting reasonably would likely to be misled to their detriment by a material representation. According to the minority commissioners the following elements must be present to justify a

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87. Holmes FTC Regulation of Unfair or Deceptive Advertising : Current Status of the Law 30 DE Paul L Rev 555 (1981).

88. In re Bristol - Myers v. FTC 102 FTC 21, 320 (1983); American Home Products Corp. v. FTC 98 FTC 136 (1981); In re Heinz W Kirchner 63 FTC 1282 (1963).

finding of deception : 1) a practice capable of misleading; (2) the practice must have impact upon a substantial number of consumers; and (3) the practice must be misleading with regard to material facts<sup>89</sup>.

While analysing the two opposite views on elements of deception, one finds common agreement on certain issues. Principally, both sides agreed that showing of actual loss to the consumer is not necessary. The split between the majority and minority was not one of actual versus potential deception but rather one of the degree of probability of deception employed as a standard.

The most controversial element of the majority's definition is to interpret an advertisement the way a prudent and reasonable man would. Although the minority opinion did not expressly endorse the foolish consumer standard which would have been the other extreme of the reasonable man's standard, it adopted "Substantial number" as a criterion which of course is not the same as a reasonable man's standard, nevertheless, is on the midway between the two extreme standards.

There was also difference of opinion on the proper interpretation of the materiality requirement. The minority objected to the majority's statement that a finding of materiality was synonymous with a finding of injury to the consumer. The minority

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89. The test of the policy statement and accompanying dissents may be found at 45 Anti-trust & Trade Reg. Rep. (BRA) 689 (Oct. 27, 1983).

interpretation by contrast, simply stated that the misrepresentation must have been material to the consumer. Even so, the underlying analysis of the material requirement in the two statements appear quite similar<sup>90</sup>.

The policy statement issued by the commission has no force of law. it can be ignored by the future commissioners and courts. Nevertheless, the FTC Commission in *Cliffdale Associates, Inc*<sup>91</sup> and *Thompson Medical Co, Inc*<sup>92</sup> applied the standard set in the policy statement in order to reach a particular conclusion. In *Cliffdale Associates*, the Administrative Law Judge applied the principle which had strong similarities with the minority opinion of policy statement. The commission rejected these observations by saying that "it is circular and inadequate to provide guidance on how a deception claim should be analysed and then proceeded to articulate its own standard for determining whether a practice is deceptive. This standard precisely echoed the definition that had been set forth in the 1983 policy statement. In *International Harvester*<sup>93</sup> the respondent who was manufacturer of tractors failed to warn the consumers about the defect with the result the consumers were injured. The commission did not find the respondent guilty, not by invoking principles set in the policy state-

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90. For detailed discussion on this policy statement see candace lance oxendale, *The FTC And Deceptive Trade Practices : A Reasonable Standard?* Emory Law Journal, Vol. 35 (1986) at 684.

91. 103 FTC 110 (1984).

92. 104 FTC 648 (1984).

93. 104 FTC 949 (1984).



ment but by relying on cost - benefit analysis. It was held that the failure to warn about a latent safety hazard is a pure omission. The seller is not responsible for disseminating all information about its product which might be helpful to any given consumer, the implied warranty of fitness which arose upon the sale of a product was not violated by the failure to disclose each and every potential safety problem. The determinative factor was the degree of risk. The stringent requirement of disclosure would cause advertisements to be overrun with every conceivable disclosure about every aspect of a product.

The dissenting opinion stated that the undisclosed facts must be both material and necessary to correct a false expectation held by a substantial body of consumers. Thus the dissenting opinion retained traditional deception analysis, the majority went outside deception law altogether to create a separate doctrine for pure omission which is based on cost-benefit analysis.

In India, both the MRTPC and CDRA'S did not find occasion to expound the phrases; "unfair method and unfair or deceptive trade practice". So independent grounds to attack a Trade practice as being unfair or deceptive have not been formulated. In fact these expressions have been used interchangeable. The principles relating to "unfairness" and "deceptiveness" evolved by the American courts can be a good guide for the MRTP Commission and redressal agencies. But it cannot be lost sight of that initially the American courts did not demand higher standard of proof as they are demanding at present for the reason, the consumer protection laws in American are now a century old. The

awareness level of consumer rights has markedly increased there and consumers are not only conscious of their rights but are comparatively organised. On the other hand, consumer protection laws in India are recent in origin. The consumers are not only illiterate, unorganised, ignorant but they suffer in silence. In fact consumer movement has not yet blossomed and what ever consciousness is there, it has not percolated to grass root level. So it will not serve any purpose if American standards are blindly followed without taking into account the society for whose benefit laws are enacted. The following definitions are therefore, suggested for unfair and deceptive practices:

An unfair trade practice is a trade practice which causes substantial injury to consumers which is not outweighed by an offsetting consumer or competitive benefits that the practice produces.

**Explanation:** While determining as to whether injury to the consumers is substantial, regard shall be had to the value of the goods or services in question.

A deceptive trade practice is a trade practice which has a potential to mislead consumers of ordinary intelligence with regard to material facts.



# ***Chapter IV***

## **COMMERCIAL ADVERTISING - LEGAL PERSPECTIVES**

In ancient times, advertising was not known because marketing was almost entirely unknown. Whatever was produced was consumed easily. There was no surplus. With the advancement in civilization and social needs extra production was achieved which was sold to other persons. This marked the beginning of marketing<sup>1</sup>. Since market place was relatively small, and because most buyers were illiterate, the original advertisers sought to attract their attention by voice, drum, horn and samples of the merchandise offered. Advancement in civilization brought through mechanical progress, education, the development of communication, transportation and postal system have changed the form but not the nature of advertisements. The crier has turned his attention to more dignified radios and television commercials<sup>2</sup>. Print media has also played an important role for advertising the products. This in fact has become world wide phenomenon. In America the advertising expenditure swelled from twelve and half billion dollars in 1962 to eighteen billion dollars in 1969<sup>3</sup>. In Canada, although advertising expenditure is smaller, it has increased

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1. For general discussion on the evolution of advertising See M.N. Mishra, Sales promotion and Advertising Management, 1994.
  2. Rudoff Callmann; The Law of Unfair Competition, Trade Marks and Monopolies 3rd Ed. 1971 vol.1 at 631.
  3. News-week August 18, 1969, P.62.

by 120% between 1954 and 1965 and grew relatively as a percentage of the gross national product from 1.60% in 1954 to 1.75% in 1965<sup>4</sup>. In India TV revenue through ads in 1993 was 430 crores and in 1994 it came to 530 crores. The print media's ads revenue in 1993 was 200 crores and in 1994 it was 2500 crores<sup>5</sup>

**TABLE 1**

**Showing Top Five Spenders On Advertising And Publicity  
In India In The Year, 1992<sup>6</sup>.**

X Company	Net sales in Rs	Advt.& Publicity
Hindustan lever	1,50,658	4,468
I T C	98,157	2,561
Brooke Bond	63,877	2,109
Godfrey Philips	48,085	1,705
I C I	69,278	1,628

(Figs in Rs Lakhs)

Divergent views have been expressed relating to the role of advertisements vis-a-vis consumers. Thus two schools of thought have developed. One view is that the advertising creates noxious values to impel the (citizen) into becoming a 'virtuous consumer'. Advertising has single handedly transformed the average citizen into a passive, lazy, greedy, sensual, wooly-minded

4. D.B.S Advertising Expenditure in Cannada, 1965, P.6 See also Firestone, The Economic implications of Advertising (Toronto, 1967), PP. 34-38.

5. The Times of India, New Delhi, Monday August 8, 1994 at 14.

6. The Economic Times, New Delhi, june,25; 1992.

materialistic, culturally depraved, whose head has become a TV tube and whose motto is "consume"<sup>7</sup>.

Another view is expressed by a Russian writer Kuruin in the following words:

Thanks to well organised advertising, the consumer can more rapidly find the goods needed by him, purchase them with small expenditure of time, and select the goods according to his taste ..... The presumption that a good product needs no advertising is dying<sup>8</sup>.

Leaving aside the Juristic views, a survey conducted in Britain in 1975 by WOP Market research<sup>9</sup> shows that consumers were

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7. Jones, The Cultural And Social Impact Of Advertising On American Society, 8. Osgoode Hall L. J. 65 at (1970). Similarly as early as 1800, Williams Cobbett referred to advertising as this species of falsehood, filth and obscenity. Richard Higgart wrote of advertising as out to achieve its ends by emotionally abusing its audiences. Pat Gierth of a well known advertising agency says that advertising "has its own quotas of visual, verbal and mental pollutants. Quoted in D. S. Nicholl: Advertising 1973 at 159. Duggan opines: Advertising, which superficially plays an informative role, is seen in fact as a manipulative device which creates a scheme of wants in the consumer by rearranging his motives. Purchasers are induced not by the presentation of products which will satisfy existing needs in the consumer, but by appealing to his susceptibilities and subconscious drives. See A. J. Duggan, Fairness in Advertising: In pursuits of the Hidden Persuaders, 11. Melb U. L. Rev. 50 at 86 (1977).
  8. Quoted from Marshall Goldman, Product Differentiation and Advertising : Some Lessons from Soviet Experience in Speaking of Advertising 352-53 (Toronto 1963), See also the Report of the Royal Commission on Consumer problem and inflation (the Prarice Report) 1968, PP.252-253 wherein Prarice Royal Commission says that advertisements provide five services to consumers : information, acquaintance with the variety of existing products : acquaintance with the new products and charges. Pre-shopping accumulation of knowledge to save time and to better arm the consumer with fact necessary to the purchase, and acquaintance with claims of producers.
  9. Consumerism, Political, Social, Economic Review, 2 July, 1975 at P.8.

just as satisfied purchasing unadvertised products, and a clear majority thought most advertisements were misleading or dishonest.

**TABLE 2**  
**CONSUMER VIEWS OF ADVERTISING**

	Agree Strongly	Agree	Disagree Strongly	Dis- agree	Nei- ther	DK
Rather buy an advertised product	2%	32%	39%	2%	21%	4%
Advertisements tell the truth	1%	23%	52%	9%	13%	2%

A survey based on interviews with nearly 9,500 consumers throughout the EEC, including Britian confirms that consumers although believe that advertising provides useful information, they are still highly sceptical of it<sup>10</sup>.

**TABLE 3**  
**OPINIONS ON ADVERTISING IN EUROPE**

	Agree entirely	Agree on the whole	Disagree on the whole	Disagree entirely	Do not know/no reply
Advertising provides consumers with useful information	10%	40%	29%	17%	4%
Advertising often makes consumers buy goods which they do not really need	38%	39%	14%	6%	3%
Advertising often misleads consumers as to the quality of the products	38%	38%	15%	3%	6%

10. European consumers (Brussels : Commission of European communities 1976 at 57 - 58 c.f. Ross cranston, Consumers and The Law 1978 at 41.

In India the consumers complaints council CCC, a wing of the advertising standard council of India ASCI recieved more than 1,200 complaints against misleading advertisements since its inception in 1985 and around 95 per cent of these were misleading<sup>11</sup>.

Keeping in view the various points, the truth of the matter is that while there is no need to quarrel with the premise that information with respect to most product characteristics is available as a result of sellers responding to incentives generated in the market place, there nevertheless remain many areas where key information necessary for consumers to make sensible choice between rival brands or to decide whether to buy the product at all, is absent<sup>11a</sup>.

Traders in order to convince the consumers that their product is having added advantages, unscrupulously resort to advertising campaign which quite often is either false or misleading. The guises under which false or misleading advertisements appear are as varied as they are ingenious<sup>12</sup>. The term false or misleading advertisement has not been defined either under the Monopolies and Restrictive Trade Practices Act<sup>13</sup>, 1969 or under

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11. The Times of India, New Delhi 21.05.1993.

11a. Robert Pitofsky, Beyond Nader : Consumer Protection And the Regulation of Advertising. Harv. L R Vol. 90, No. 4, 1977 at 664.

12. *Lapointe Machine Tool Co. v. J. N. Lapointe Co.*, 115 Me 472 A 348 (1916).

13. Hereinafter referred to as the MRTP Act, 1969.

the Consumer Protection Act<sup>14</sup>, 1986. The term "false" means "not true"<sup>15</sup>, "designed to deceive"<sup>16</sup>, "Contrary to fact"<sup>17</sup> and the term "misleading" which is wider than "false" *means capable of leading into error*<sup>18</sup>. These false and misleading advertisements are covered in the commercial advertising. The courts throughout the globe have remained busy in resolving the nebulous issues surrounding them, but in India no plausible jurisprudence has been developed. The various issues germane to the commercial advertising are discussed hereunder:

### **Constitutional Protection:**

*The Hamdard Dawakhana v. Union of India*<sup>19</sup> is the first case which came up before the Supreme Court in which the constitutional Protection to commercial advertisements has been decided. The

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14. Hereinafter referred to as CP Act, 1986. The term false advertisement has been defined under section 15(a) of the Federal Trade Commission Act, 1914 of USA in the following words: The term false advertisement means an advertisement other than labelling which is misleading in material respect; and in determining whether an advertisement is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound or which the advertisement fails to reveal, facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relate under the conditions described in said advertisement, or under such conditions as are customary or usual.

15. *State v. Arnett*, 338 MO 907, 92 S.W.Ad 897, 900.

16. *Sential Life Insurance Co. v. Blackmer*, C.C.A Colo, 77 F."d 347, 352.

17. *In re Davis*, 349 Pa 651, 37 A. 2d 498, 499.

18. Donald and Heydon, *Trade Practices Law*, (Vol.2) 1978 at 553.

19. AIR 1960 Sc 551.

case impugned the constitutionality of Drug and Magic Remedies (Objectionable Advertisements) Act, 1954 on the ground that unreasonable restrictions have been imposed on freedom of speech. It was laid down:

An advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Art 19(a) which it seeks to aid by bringing it to the notice of public. When it takes the form of commercial advertisement which has element of trade or commerce it no longer falls within the concept of freedom of speech, for the object is not the propagation of ideas, social, political or economic or furtherance of literature or human thought, but the commendation of the efficacy, and importance of certain goods<sup>20</sup>

The advertisements prohibited by section 3 of Act of 21 of 1954 relate to commerce or trade and not to propagation of ideas; and advertising of prohibited drugs or commodities of which the sale is not in the interest of the general public cannot be speech within the meaning of freedom of speech and would not fall within Art. 19(1)(a)<sup>21</sup>.

It is submitted that the judgment of the Supreme court is erroneous. To say that an information not in the interest of general public cannot reap the benefits of guarantee enshrined in Art.19(1)(a) is one thing, but to say that an information with a motive to promote commercial interest cannot qualify for the "speech" so as to enjoy the constitutional guarantee of freedom is entirely different.

The importance of information to the operation of efficient markets is by now fairly well accepted. For the proper utilization of money and right purchasing decision, the consumer must

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20. Id. at 563.

21. Ibid.



have information.<sup>22</sup> Advertising is a medium of information and persuasion, providing much of the day to day education and facilitating the flexible allocation of resources necessary to free enterprise economy. Neither profit motivation nor desire to influence private economic decision necessarily distinguishes the peddler from the preacher, the publisher or the politician<sup>23</sup>. However, this should not be interpreted to mean that the advertiser has a right to be wrong but there should be no censure on the dissemination of truthful information needed by the large section of the society designated as consumers merely on the ground that the information has commercial motives. This will naturally need the gleaning of information necessary for subserving public good from that which is false, deceptive or misleading.

The above cited opinion of the Supreme Court was fortified by the views of the US Supreme Court expressed in *Valentine v. Chrestensen*<sup>24</sup>, wherein it was laid down that the constitution imposes no such restraint on government as respects purely commercial advertising. It is amusing to note that this judgment had already been disapproved when our apex court quoted<sup>25</sup> it with approval.

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22. For detailed discussion on the need of consumer information, See Howard Beales, et.al., The Efficient Regulation of Consumer Information, Jol. of Law and Eco., vol.XXIV 1981.

23. Developments in the Law -- Deceptive Advertising, (1967) 80 Harv. L. Rev. 1027.

24. 316 US 52, 62 S. ct. 86 L Ed. 1262 (1942).

25. Quoted at 563 Supra note 13.

In *Cammarano v. United States*<sup>26</sup>, it was stated:

*Valentine v. Chrestensen* ruling was casual, almost offhand. And it has not survived reflection. That freedom of speech of the press directly guaranteed against encroachment by the federal Government and safe-guarded against state action by the Due process clause of the fourteenth Amendment, is not in terms or by implication confined to discourse of a particular kind and nature ... Those who make their living through exercise of first Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive.

Later on the US Supreme court in a number of cases<sup>27</sup> held that the commercial advertisements do enjoy protection of the first amendment. But nonetheless this protection is by no means absolute. This was made clear in a landmark decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>28</sup>. In *Central Hudson Gas & Electric corporation v. Public Service Commission of New York*<sup>29</sup>, four pronged test was propounded.

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26. 358 US 498, 513 - 14 (1959).

27. For instance In *Pittsburgh Press Co v. Pittsburgh Common on Human Relations*, 37 L. Ed. 2nd 669 (1973), an ordinance that forbade newspapers from running help wanted ads in sex designated columns was upheld. Nevertheless, it was conceded that these ads though are classic examples of commercial speech, are not entirely without first amendment protection. Similarly in *Bigelow v. Virginia*, 44 L. Ed. 2d 600 (1975), the court invalidated a state statute which prohibited the advertising of abortion services and made such advertising a misdemeanor.

28. 425 US 748 96 S.ct 1817, 48 L. Ed 2d 346 (1976). The court said, "We of course do not hold that (Commercial Speech) can never be regulated in any way. Some forms of commercial speech regulations are surely permissible.

29. 447 US 557, 100 S.ct 2343, 65 L. Ed.2d 341 (1980)., For the application of these tests see 463 U.S 60, 103 S.ct 2875, 77L. Ed. 2d 469 (1983) *Bolger v. Youngs Drug Products corp.* See also *Posadas De Puerto Rico Associates v. Tourism Company of Puerto Rico* 478 U.S. 328, 106 S.ct 2968, 92 L.Ed. 2d 266 (1986).

(a) The Commercial advertisement must be truthful and not misleading (b) It has to be established that asserted governmental interest because of which commercial advertisement is attempted to regulate is substantial. (c) If both inquires yield positive answers, then it has to be proved that the said regulations directly advances the governmental interest and (d) the governmental regulations are not excessive than are necessary to serve that interest.

The Supreme Court in *Indian Express Newspaper Bombay Ltd. v. Union of India*<sup>30</sup> over-ruled the Hamdard Dawakhana case and held that the observations made in that case are broadly stated. The commercial advertisement cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by businessmen<sup>31</sup>. In a recent case of *TATA Press Ltd v. Mahanagar Telephone Nigam Ltd*<sup>31a</sup>, the Supreme Court went ahead by extending the protection of Art. 19(1)(a) not only to advertisers but also consumers. It was laid down that this Article guarantees not only the freedom of speech and expression, it also protects the rights of the individual to listen, read and receive the said speech. So far as the economic needs of citizens are concerned, their fulfilment has to be guided by their information disseminated through the advertisements. The protection of Article is available to the speaker as well as to the recipient of the speech<sup>32</sup>.

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30. AIR 1986 Sc 515.

31. Id at 547.

31a. AIR 1995 Sc 2438

32. Id at 2448.

### Application of Mensrea:

Since the famous case of *Pasley v. Freeman*<sup>32a</sup>, the liability under common law for false representation requires scienter or knowledge of falsehood essential. This common law principle however, has not been extended by the courts in the statutes aiming at protecting consumers which are silent on the requirement of scienter.

In United States as a general rule courts do not inquire into good or bad faith of the advertiser or the purpose of the advertisement in passing upon its truth or falsity. The point for consideration in such cases is whether under the facts and circumstances in connection with the publication of the advertisement, the language in and of itself, without regard to good or bad faith is calculated to deceive the buying public<sup>32b</sup>. "Calculated" however, does not mean "intended" but "apt" to deceive<sup>33</sup>. The rationale of this principle is that even innocent misrepresentation involves some element of fraud, they (representors) must therefore extricate themselves from it by purging their business methods of a capacity to deceive<sup>34</sup>.

In Australia in order to make it clear that the intention is not necessary for the proscription of a trade practice as deceptive or false, the words "or is likely to mislead or deceive"

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32a.(1789) 3. T. T. 51.

32b.Ford Motor Co. v. F. T. C 120 F 2d 175 See also F. T. C. v. Real Product Corp., 90 F 2d 617; L & C Mayers Co. v. F. T. C. 97 F 2d 365; Bear Mill Mfg., FTC, 98 F 2d 67.

33. Common Wealth v. Slone, 321 Mass 713, 75 NE 2d 517 (1947).

34. F. T. C. v. Algome lumber Co., 291 US 67, 81, 78 L. Ed. 655, 54 S.ct 315 (1934).

were inserted in section 52<sup>35</sup> of the Trade Practices Act, 1974 through an amendment in the year, 1977. It is now made clear through the judicial gloss that intention to deceive is not necessary<sup>36</sup> and this is so, both, where it is alleged that the conduct in question was in fact misleading or deceptive as well as where it is alleged that it was likely to mislead or deceive<sup>37</sup>.

In Canada section 33(c)<sup>38</sup> of the Combines Investigation Act, 1923 prohibits a representation relating to price if that representation is materially misleading. The Ontario Supreme Court in *R v. Allied Towers Merchants limited*<sup>39</sup>, held that there is nothing in the express language of section 33 C(1) disclosing any intention that mens rea, in the sense that the materially misleading representation made must be known to be such by the accused, is not an essential ingredient of the offence.

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35. Section 52 now reads as : A corporation shall not in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive...

36. *Puxu Pty Ltd. v. Parkdale Custom Built Furniture Ltd.* (1979) 31 ALR 73, 5 TPC at 945; *Firona Pty Ltd. v. Hersfield Holdings* (1981) 6 TPC 414; *Brown v. Jam Factory Pty Ltd.* (1981) 35 ALR 79; *Diary Vale Metro Co-operative Ltd v. Brownes Dairy Ltd* (1981) 6 TPC 793 at 799.

37. *Taperell, Vermeesch and Harland, Trade Practices and Consumer Protection*, 610 Para 1414 (1983).

38. Section 33 C(1) runs as : Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public by any means whatever concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence punishable on summary conviction.....

39. (1965) 20. R. 628, (1966) 1 C.C.C 220.

In England it is an offence to make knowingly or recklessly a false statement about the service, accommodation or facilities<sup>40</sup>. As to recklessly, a statement is deemed to be made so if it is made regardless of whether it is true or false, whether or not the person making it had reasons for believing that it might be false<sup>41</sup>. It was made clear in *BFI Warehouse Ltd v. Nattrass*<sup>42</sup>, that recklessly does not imply dishonesty. The prosecution need to show only that the defendant did regard to the truth or falsity of his statement even though it cannot be proved that he deliberately closed his eyes to the truth. This rather diminishes the force of mens rea requirement<sup>43</sup>. In view of the difficulties surrounding this provision it is perhaps not without significance that it has been omitted from the otherwise very similar Hong Kong Trade Descriptions ordinance, 1980<sup>44</sup>.

In India section 36-A of the MRTP Act, 1969 and section 2-(r) of the CP Act defines unfair trade practice. Throughout this definition words like, falsely<sup>45</sup>, intentionally<sup>46</sup> and knowingly<sup>47</sup>

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40. Section 14 of the Trade Descriptions Act, 1968.

41. Section 12(2)(b).

42. (1973) 1 All ER 762.

43. Brian Harvey & Deborah L Parry : The Law of Consumer Protection and Fair Trading, (1992 4th ed.) at 358.

44. Id 341

45. For instance Sub-clause (i) states : falsely represents that the goods are of particular standard, quality, grade, composition, style or model; see also Sub-clause (ii), (iii), (vi).

46. Clauses 2, 3 & 5.

47. Clause 4.

have been used. These words denote nothing but mens rea <sup>48</sup>. Then should mens rea be imported in the definition of unfair trade practice and in its presence trader be not held liable to compensate for any loss or injury to consumer, etc under sections 12(e) and 14 of the MRTP and CP Acts respectively? The answer to this question is flat-ly no, for the following reasons.

The class of practices legislated in the Act are not criminal in any real sense but are practices prohibited under penalty. The efficacy of the two Acts cannot be attritioned by reading mens rea in the liability for compensation to the consumer who has suffered loss due to the false representation. The compensation is the only tangible remedy available under the two Acts to deter the unscrupulous trader. The other remedy available i.e. 'cease and desist order' in MRTP Act applies only to the future conduct.

The Supreme court while interpreting the provisions of another consumer protection legislation, i.e. Prevention of Food Adulteration Act, 1955 which involves criminal prosecution, excluded the application of mens rea in the offences under the Act<sup>49</sup>. If mens rea can be excluded in the criminal offences, why cannot be the same dispensed with in the misrepresentations involving only penalty.

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48. G. Scidasivan Nair, Mens Rea In Consumer Offences, Leela Krishnan (ed) Legal Control of Consumer Protection, at 293.

49. See *Sarjood Prassad v. State of UP*, AIR 1961 Sc.631; *Pyarali K. Tejani v. M R Dange*, AIR 1974 Sc.288; *A P Grain and Seed Merchants Association v. Union of India*, AIR 1971 Sc.2346; *State v. Udipi Co-operative Milk Society*, AIR 1960 Mys 80; *Public Prosecutor v. Dhanapal*, (1962) 2MLJ 217.

In Australia under Section 53 of the Trade Practices Act, 1977 and in Canada, section 33 C(1) of the Combines Investigation Act, 1923, criminal prosecution can be launched against the accused and the liability is strict. These enactments deal with the same subject matter as our MRTP Act and CP Act and similar phrases as falsely, intentionally and knowingly have been used but these phrases were interpreted as not including mens rea.

The Sachar Committee had recommended some defences<sup>50</sup> under section 36 A, but these defences did not find favour with the legislature when the chapter on unfair Trade Practice was incorporated in the MRTP Act. This shows that the parliament also in its wisdom thought it in-advisable to make this compensatory remedy available only in presence of mens rea.

#### Standard of Protection:

One of the objectives behind the law aiming to curb unfair trade practices is to protect the general public from false and misleading advertisements. The question is whose intelligence in

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50. For clause (1) of section 36-A defences recommended were:

- 1) that the act or omission giving rise to the offence was result of a bonafide error; or (b) that he took reasonable precaution and exercised due diligence to prevent the occurrence of such error and that he took reasonable measures forthwith, after the representation was made, to bring the error to the attention of the class of persons likely to have been reached by the representation.
- 2) the person whose business it is to publish or arrange for publication of advertisement and did not know or had reason to suspect that its publication would amount to contravention of any such provision shall not be liable under the Act. See for further details, The Report of the High-Powered Expert Committee on Companies and MRTP Acts, 1978 at 271.



the general public should be treated as a standard in order to determine the character of an advertisement. The choices include : "the reasonably intelligent consumer", the "average consumer", and the "most naive hypothetical consumer".

In America it is fool hardy to claim that advertising literature will only be read by a certain part of the public. Thus it is worthless argument that "one putative audience will not read and the other will not heed to an advertisement<sup>51</sup>". The advertisement must not mislead general public and general public has been defined as that vast multitude which includes the ignorant, the unthinking and the credulous who in making purchases do not stop to analyse but too often are governed by appearances and general impressions<sup>52</sup>. The average purchaser has been variously characterised as not straight thinking<sup>53</sup>, subject to impressions<sup>54</sup>, uneducated<sup>55</sup>, and grossly uninformed<sup>56</sup>; he is

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51. *Belmont Laboratories v. Federal Trade Commission*, 103 F 2d 538 (CCA 3rd, 1939).

52. *Florence Mfg. Co. v. J. C. Dowd & Co*, 178 F 73 (CCA 2nd 1910) *A.P.W Paper Co. v. F.T.C.*, 149 F 2d 1945); *Gulf Oil Corp. v. F.T.C.* 150 F 2d 106 (CCA 5th, 1945); *Plorillard Cp. v. F.T.C.* 186 F 2d 52 (CCA 4th, 1950; *American Life & Accident Ins. Co. v. F.T.C.* F 2d 289 (CA 8th, 1958); *Colgate Palmolive Co. v. F.T.C.*, 310 F ed 89 (CA 1st 1962).

53. *Charles of the Ritz Distributors Corp v. F.T.C.* 143 F 2d 676 (CCA 2nd, 1944).

54. *Stanley Laboratories v. F.T.C.*, 138 F 2d 388 (CCA 9th 1943).

55. *Aronberg v. F.T.C.* 132 F 2d 65 (CCA 7th, 1942).

56. *Berkey and Gay furniture Co v. F.T.C.*, 42 F 2d 427 (CCA 6th, 1930)

influenced by prejudice<sup>57</sup> and superstition; and he wishfully believes in miracles, allegedly the result of progress in science<sup>58</sup>.

The purchaser is not duty bound to suspect or discredit the advertisers claims<sup>59</sup>, and the vendor knowing this must act accordingly<sup>60</sup>. The ordinary purchaser is not conversant with the technical cant of the sciences, and he is untrained in the Law<sup>61</sup>. The language of the ordinary purchaser is casual and unaffected. He is not an expert in grammatical construction<sup>62</sup> or an educated analytical reader<sup>63</sup> and therefore, he does not normally subject every word in the advertisement to careful study<sup>64</sup>.

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57. *Benton Announcement v. F.T.C.*, 130 F 2d 254 (CCA 2nd, 1942).

58. *In the matter of Great Britain Spiritualist Church*, 29 F.T.C. 782 (1939).

59. *Supra* note 46 at 680.

60. *F.T.C. v. Standard Education society*, 302 US 112, 822 Ed. 141, 58 S at 113 (1937).

61. *F.T.C. v. Algoma Lumber Co.*, 219 US 67 L Ed 655, 54 S at 315 (1934).

62. *D.D.D Crop v. F.T.C.*, 125 F 2d 679 (CCA 7th, 1942); *Sebvone Co v. F.T.C.*, 135 F 2d 676 (CCA 7th, 1943).

63. *Supra* note 55.

64. Chairman Miller of the Federal Trade commission suggested that section 5 be amended to (1) require that a deception be material (2) preclude a challenge to a statement of opinion on deceptiveness grounds; and (3) require that deceptiveness be tested on the basis of perceptions of a reasonable consumer standard rather the most gullible consumer standard suggested by many of the cases construing section 5. However, other members showed disagreement with the Chairman's desire to see the commissions power to attack deception further limited. See 1056 BWA Antitrust and Trade Reg. Rep 589 (1982).

In India the Sachar Committee had also endorsed the "average purchaser standard"<sup>65</sup> as a test to determine the character of a trade practice. But the Supreme court in *relakhanpal National Ltd v. MRTP commission*<sup>66</sup>, failed to lay down any clear cut principle. The apex court started with a "common man's test" and concluded with a "reasonable man's intelligence" as a standard, the court observed;

When a problem arises as to whether a particular act can be condemned as an unfair trade practice or not, the key to the solution would be to examine whether it contains a false statement and is misleading and further what is the effect of such representation made by the manufacturer on the common man? Does it lead a reasonable person in the position of a buyer to a wrong conclusion?<sup>67</sup>.

The judgment was influenced by the law as stated in Halsbury's law of England<sup>68</sup> relating to representation. Therein it is stated that the test by which representation is to be judged is to see whether the discrepancy between the fact as represented and the actual fact is such as would be considered material by a reasonable representee<sup>69</sup>.

It is submitted that the law enunciated in the Halsbury's law of England reflects the hey days of Caveat Emptor. This time

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65. Supra note 50 at 263.

66. AIR 1989 Sc 1692. This is the first case decided by the Supreme Court relating to UTP under section 36 A of the MRTP Act.

67. Id at 1695.

68. Quoted with approval at 1695.

69. Halsbury's laws of England (4th ed) Para 1044 and 1045.

honoured doctrine has now been metamorphosised in to Caveat Venditor. Both, MRTP Act and CP Act reflect this change<sup>70</sup>. Thus this "reasonable representee" standard cannot hold water any more.

There is no denying the fact that the Indian consumers are not only unorganised, ignorant, ill informed and ill advised, they are also ignorant of their rights. Consumers are not conscious of the surreptitious methods of the traders. Traders are fully in know of the plight of the consumers. They therefore, harvest it to the maximum. So it will not serve any worthwhile purpose if "reasonable man's" standard is upheld, leaving vast majority of credulous, gullible and unthinking, unprotected. However, this "common man's" test cannot be regarded as a general standard applicable in all situations. The context in which an advertisement is addressed should also be taken into account. For example, where an advertisement for a specialised equipment is directed at an expert group, such as engineers, the standard will be different as against the advertisement addressed to general consuming public or directed to children.

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70. MRTP Commission in Director General V. Iyer and Sons p Ltd. (1991) 3 Comp L J 190, held that when a problem arises as to whether a particular act can be condemned as an unfair trade practice or not, the key to the solution would be to examine whether it contains a false statement and is misleading and further what is the effect of such representation on the common man. Id at 192.

### Defence of Puffing:

The defence of puffing has roots in common law and is available both, under law of Torts and Sale of Goods Act. It was bequeathed by Caveat Emptor doctrine<sup>71</sup>. By virtue of defence of puffing a wide latitude is allowed to traders in extolling the qualities of the things they have to sell. Purchasers are expected to be capable of exercising reasonable judgment and discrimination and they cannot complain merely because their own opinion of the goods may fall far below that of the seller. So long therefore, an advertiser confines himself to general praise of his goods, he is fairly safe, no matter how exaggerated his praise may be<sup>72</sup>. The rationale of puffing defence has been explained in *Kirchner V. FTC*<sup>73</sup>, in the following words:

True, as has been reiterated many times, the commissions responsibility is to prevent deception of the gullible and credulous, as well as the cautions and knowledgeable .....This principle loses its validity, however, if it is applied uncritically or pushed to an absurd extreme. An advertiser cannot be charged with liability with respect of every conceivable misconception, however outlandish, to which his representation might be subject

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71. An American commentator opines: The term which grew up in an era of Caveat Emptor, reflects the view that the buyer should expect a considerable amount of actual lying by sellers eager to dispose of their goods. See *Developments in the Law - Deceptive Advertising*, (1967) 80. Harv.L Rev. 1054.

72. Bishop, *Advertising and the Law*, Benn, 2nd Ed. at 47. it is also said about puffing that "it is a privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would be influenced by such talk". See Prosser, *Handbook of the Law of Torts* 732 (4th Ed. 1971).

73. 63 FTC 1282 (1963).

among the foolish or feeble - minded .... A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed<sup>74</sup>.

The defence of puffing which was the concomitant result of caveat Emptor was surprisingly received by the courts in various countries<sup>75</sup>, while deliberating on the issues involving consumer. In India the MRTP Commission also considered puffing as defence. In *re Weston Electronics ltd. and anothers*<sup>76</sup>. The Commission Observed:

The phrase 'Zero failure' is capable of many interpretations and dominant impression that it leaves is that the TV set manufactured by the respondent is technically close to perfection. It should be remembered that the use of hyperbole is an indispensable ingredient of good advertisement, unless it becomes indistinguishable from falsehood.

The underlying argument in the defence of puffing is that no reasonable man shall believe such advertisement as true. But this

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74. Id. at 1290.

75. In Germany, a claim of the florist that he has the most beautiful flowers in the world was considered as mere puff. 3 Reimer 385. In England, a land partly useless but described as very fertile and improvable was held as puff in *Dimmock V. Hallet*, (1886) L.R. 2 Ch. App. 21. In America it has been held as merely puff to describe a tooth paste as being one which will beautify the smile or to claim that a particular motor oil was the perfect lubricant which would enable a motor car to travel an amazing distance See *Bristol Meyer V. FTC* 1950-51 Trade Cases 62, 722 (1950); *Kidder oil Co. V. FTC*, 117 F 2d 892 (1941)

76. UTP Enquiry No.20/1985, order dated.24.6.1983. See also *DG V. Cement Corporation of Gujarat* (1992) 2 Comp LJ 331; *DG V. Milkfood Ltd. Patiala* (1994) 2 comp. LJ 373.

defence cannot reconcile with the "common man's" test as enunciated in determining the character of an advertisement. When we say law is meant to protect those who believe in miracles<sup>77</sup>, inexperienced and credulous<sup>78</sup>, puffing defence cannot find the niche in the citadel of consumer protection laws. After all an advertiser will not resort to puffing unless he has a faith that gullible consumers will be allured by his campaign<sup>79</sup>. It is obvious that the fatuous may be deceived by claims that the more intelligent or experienced purchaser will readily recognise as mere puffing<sup>80</sup>. The remarks of Handler on this point deserves mention; the maxim that a reasonable latitude must be conceded to the salesman and advertiser in boasting his own product, presupposes a defeatist attitude and an analytically fallacious approach<sup>81</sup>. Thus it is believed that modern courts will be less willing than some of the older cases suggest to encourage eulogistic statements where there is a real risk of deception<sup>82</sup>. It

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77. Supra note 58.

78. Supra note 52.

79. An American author, Preston, argues that advertisers would not puff unless they thought that some consumers would believe their claims. As a result Preston would prefer to make the puffing advertiser fully liable for his claim see Preston, *The Great American Blowups; puffery in Advertising And Selling* (1975); See also Kinter, *A Primer on the law of Deceptive Practices* 97, 192-93 (2d. ed. 1978).

80. Supra note 2 at 671.

81. Handler, *False Advertising under the Wheelerlea Act* (1939) 6 *Law and contemp. Prob.* 91, 99.

82. S pra note 37 at 616.

is pertinent to mention here that British Columbia Trade Practices Act, 1974 under-section 2(3) makes commercial puffery actionable<sup>83</sup>. Therefore, one is reminded of the opinion expressed by an Australian court while interpreting the Consumer Protection Act, 1969 (N.S.W.):

The Act under consideration is a Consumer Protection Act. Its general objective is to provide safeguards for the weaker party in numerous commercial transactions .... one of the major evils to be controlled is false and misleading advertising. It is an Act therefore, which is setting standards for advertiser ..... It is for the Act to control advertisers and not for what are claimed to be present advertising standards to mould the law<sup>84</sup>.

#### Television Commercials:

Television commercials have given new dimension to the false and misleading advertisements. Sometimes it is not possible to advertise a product with its natural colour or with the composed substances, for example true colours of coffee, orange juice and iced tea are lost in transmission on a television screen and artificial substance must be substituted to obtain a natural look. The hot television lights require the use for example, of mashed potatoes for ice cream, and shaving cream to get the kind of head that is normal on a glass of beer<sup>85</sup>. This involves the problem of interpretation of television commercials. One possible interpretation is to treat demonstration merely a dramatization

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83. Section 2(3) reads as: The use, in any oral or written representation, of exaggeration, innuendo, or ambiguity as to a material fact, or failure to state a material fact..."

84. CRW Pty Ltd. V. Sweden, 1972 AR (N.S.W) 17 at 36-37.

85. Jonathan M Purver, et.al., Business Law, Text and Cases, (1983) at 1011.



of the express claim made in the advertisement. Thus demonstration is unconnected with the express claim and so long express claim is true, the advertisement will not be treated as deceptive even though demonstration was accomplished by trickery. Second approach is to interpret television demonstration as a warranty without taking into account the express claim. Thus the demonstration obtained by employing trickery will be considered as deceptive but it is not necessary that the demonstration should prove the express claim made in the ad. The third approach is the amalgam of the first two, i.e. to interpret a television demonstration both a warranty that the result could be duplicated without trickery and as proof of the express claim made in the advertisement. A demonstration which failed either of these tests would be considered deceptive and would not be permitted<sup>86</sup>.

It appears that the American Supreme Court in *FTC V. Colgate - Palmolive Co*<sup>87</sup> has leaned in favour of the third approach. In this case advertiser sought to demonstrate that its shaving cream had super-moisturizing properties which permitted the shaving of sand paper, and thus it would be effective in shaving the toughest beards. Since on television screen sand paper appears as a plain coloured paper, the cream was applied instead of plexiglass covered with sand, which was then swept clean by a razor. The record showed that the sand paper could not be shaved unless it

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86. Stewart E; The Law of Comparative Advertising : How Much Worse is "Better" Than "Great", Col. L R (Vol.76:80) 1976, at 107.

87. 380 US 374 (1965).

is soaked for some eighty minutes. The following principles were laid down:

- 1) If it becomes impossible or impracticable to show simulated demonstration on television in a truthful manner, this indicates that television is not a medium that lends itself to this type of commercial, not that the commercial must survive at all costs;
- 2) if the inherent limitation of a method do not permit its use in the way a seller desires, the seller cannot by material representation compensate for those limitations;
- 3) where in order to substantiate an asserted claim, test, experiment or demonstration is made which is false, in other words test, experiment or demonstration is not what is claimed in a commercial, the commercial will be misleading;
- 4) where the prop is not being used for additional proof of the product claim eg mashed potato in place of ice cream, it will not be misleading but where the purpose is to give the viewers objective proof of the claims made eg in Rapid Shaving Cream, the commercial will be misleading<sup>88</sup>;

Justice Harlan in his dissent while arguing that the FTC should use that standard which evaluates only the accuracy of the representation as seen by the viewer on the screen, and that what goes on in the studio should not matter to the commission, he posed the following interesting questions:

would it be proper for respondent colgate, in advertising a laundry detergent to "demonstrate" the effectiveness of a major competitor's detergent in washing white sheets, and then "before the viewer's eyes", to wash a white (not a blue) sheet with the competitors detergent? The Studio test should accurately show the quality of the product, but the image on the screen would look as though the sheet had been washed with an ineffective detergent. All

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88. For a comment on this judgment see Robert Pitsofsky, Beyond Nader : Consumer Protection And the Regulation of Advertising, Harv. L.R. Vol.90(1977) at 687

that has happened here is the converse : a demonstration has been altered in the studio to compensate for the distortions of the television medium, but in this instance in order to present an accurate picture to the television viewer<sup>89</sup>.

However, it seems that Justice Harlan's poser received answer from the commission in *Matter of Union Carbide Corp*<sup>90</sup> that through the use of the demonstration and the statements used in conjunction therewith, respondent represents, directly or by implication that such demonstration is evidence which actually proves how the product demonstrated is superior than the competing brands.

Thus in America, both, courts and commission have thus decided to treat televised demonstrations as representing proof of the claims which means that the advertisement would have to be accurate at both ends of the television camera<sup>91</sup>.

#### Comparative Advertising:

Comparative advertising concept is as old as the art of selling itself<sup>92</sup>. The species of comparative advertising like its genus is double edged. It can act as an effective tool for consumer information and right purchasing decision. But it may also be used to mislead consumers by projecting false, incomplete,

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89. 380 US at 398.

90. 79 F.T.C. 124 (1971).

91. Supra note 86 at 109.

92. James D Jeffries, Protection For Consumers Against Unfair and Deceptive Business, Marq. L. R Vol.57, No. 4 (1974) 566.

distorted or insignificant comparisons<sup>93</sup>. In spite of its advantages, the European legal systems have traditionally prohibited or severely restricted the practice of comparative advertising as it has been seen from the view point of rival competitors as a form of unfair competition<sup>94</sup>. In Germany if such ads are understood as making comparisons with competitor's products, they fall within the general prohibition against comparative advertising<sup>95</sup>.

Under common law, the courts without any reservation took a consistent stand that the comparative advertising is not disparagement of one man's goods to project their inferiority over the goods of another. In *White v. Mellion*<sup>96</sup>, it was held that when all that is done is making comparison between the plaintiff's goods and the goods of the person issuing the advertisement, this cannot be regarded as a disparagement of which the law will take cognizance and the *raison d'être* of this policy was enunciated in *De Beers Abrasive Product Limited V. International General Electric Company of New York Limited*<sup>97</sup> that a trader may puff his

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93. There is every possibility that consumer may rely more on comparative advertisements. As Callman states : Grammatically the superlative is of stronger import than the comparative. In comparative advertising, however, the contrary is often true because puffing by superlatives is either discounted or ignored. See Callman, *The Law of Unfair Competition, Trade Marks, And Monopolies* (ed. 1968)

94. See Taperell, Vermeesch and Harland; *Trade Practices and Consumer Protection*, 610 Para 1444 (1983).

95. Warren S Grimes; *Control of An Advertising in the United States And Germany : Volks Wagen Has a Better Idea*: Harv. L. R Vol.84 (June, 1971) at 1794.

96. (1895) Ac 154.

97. (1975) All ER 599.

own goods even though this may, logically speaking, involve the denigration of a rival's goods. Since puff was considered a good defence in case of false or misleading advertisement and can be said as an extension of Caveat Emptor doctrine, nevertheless, objectionable point is to give latitude to a trader to disparage goods of another by making a comparative statement which is false. This licence to a trader to denigrate the goods of another was given by Lindley M. R. in *Hubbock and Sons V. Wilkinson, Heywood and Clask Limited*<sup>98</sup> when he said "to say that one's own goods are better than other people's ..... even if each particular charge of falsehood is established, it will only come to this that it is untrue that the defendants paint is better than or equal to that of the plaintiff's for saying of which, no action lies. However, realising the anticonsumer effect of this blanket rule. Walton J in *De Beers Abrasive Products Limited V. International General Electric Co of New York Limited*<sup>99</sup> held that certain forms of comparative advertising may give rise to an action for slander of goods and to draw a line between the permissible and the impermissible, the test to be applied is whether a "reasonable man would take the claim being made as being a serious claim or not"<sup>100</sup>. He rejects the alternative test as to whether there had been a specific allegation of defects or demerits, because such allegations can be made which would not be taken

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98. (1899) IQB 86 (CA).

99. Supra note 97.

100. Id at 605.

seriously : a claim for example, that a Rolls-Royce car sinks in water when claimants car does not<sup>101</sup>. The precise solution to this problem is given by Holdson L.J. in *Cellacite and British Uralite Ltd V. Robertson Co Inc*<sup>102</sup>, he said the general position in law is "Comparsion - yes, but disparagement - no" where a trader makes detailed and untrue disparagements, he lays himself open to an action for slander of goods.

At present, the consumer protection legislations namely, the Federal Trade Commission Act, 1914 of America, Combines Investigation Act of Canada, The Trade Practices Act, 1974 of Australia, Monopolies And Restrictive Trade Practices Act, 1969 and Consumer protection Act, 1986 of India do allow comparative advertising<sup>103</sup>, provided of course that is not false or misleading. However, to determine whether a particular comparative advertisement is false, misleading or not, is not free from difficulty. For the reason (a) there is no clear line between "Comparative and Non-Comparative". (b) a considerable amount of puffery has traditionally been allowed in advertising, the same is true in case of comparative advertising. The limits of permissible puffery are far from being clear. In India there is also no clear cut

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101. Criticising this approach of Walton J, R G Lawson opines : This test is misconceived. Such claims as he instanced be cause of their nature do not infact point to defect or demer its. Rolls Royce cars are not meant to float in water. See R G Lawson, Advertising Law (1st Ed. 1978) at 259.

102. Times, 23rd. July, 1957.

103. These Acts regulate only false or misleading advertisements. Therefore, there is no harm in making truthful advertisements including comparative advertisements.

legislative policy regarding the cases in which a trader through comparative advertising projects true but insignificant comparisons or when he described accurately competitors goods but exaggerated the merits of his own goods. Besides the quality comparisons, there is no legislative or judicial policy regarding the price comparisons.

In Australia it has been said that the comparative advertising is permissible unless it fails to compare "like with like"<sup>104</sup>

. This can be further elaborated by holding that the quality has to be compared with the quality of competitor's goods and price with the price, and it is also permissible to the trader to project his goods as more superior and less expensive as compared to his competitor.

The puffing is considered a defence in false and misleading advertisements, both in America<sup>105</sup> as well in India<sup>106</sup>. However, in America, in order to check the possible misuse of this defence, it has been emphasised that there is a difference between the mere claim of superiority and assertion of fact that implies an ability on the part of the defendant to substantiate the assertion.

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104. *Stuart Alexander and Co (Interstate) Pty Ltd v. Blenders Pty Ltd* (1981), 37 ALR 161 at 163.

105. *Smith - Victor Corp. v. Sylvania Electric Products Inc.* 242 F. Supp 302 (N.D. 111, 1965).

106. *Re-Weston Electronics Ltd and others UTP Enquiry No. 20/1985 order Dated. 24. 06. 1985.* See also *DG V. Cement Corp. of Gujarat* (1992) 2 Comp LJ 331 : *DG V. Milk Food Ltd, Patiala* (1994) 2 Comp LJ. 373.

On the question of insignificant comparisons, neither the MRTP Commission nor Consumer Redressal Agencies found any occasion to deliberate. The American courts have failed to take any consistent stand. In *P Lorillard Co V. FTC*<sup>107</sup>, the Reader's Digest had published an article indicating that its laboratory tests had shown that all cigarette brands were more or less equal in tar and nicotine content, and the difference that did exist were so slight that they would not make any difference in the physiological effect on the smoker. However, a table attached with the article did show that the old Gold cigarettes tested, contained less nicotine tars and resins than the other brands, of course the difference was utterly without meaning so far as efficacy upon the smoker is concerned. Nevertheless, lorrillard ran an advertising campaign stressing the fact that old Gold was found lowest in tars, nicotines and resins, while making no mention of the basic thrust of the article. The commission passed cease and desist order and court of Appeals also did not change that. The concern however, of the commission and court was not that Lorrillard highlighted insignificant difference but the advertisement was edited in such a way as to create an entirely false and misleading impression, not only as to what was said in the article, but also as to quality of the company's cigarettes. Since court emphasized only the misrepresentation of the Reader's Digest article and not the deceptiveness of the claim itself, so it is not clear whether the result would have been

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107. 186 F. 2d 52 (4th Cir, 1950).



been the same if, rather than relying on the Reader's Digest article, the Lorrillard Co had conducted its own tests showing that old Gold contained less tars and nicotine than other brands and then advertised this fact. The *International Parts Corporation*<sup>108</sup> did exactly the same. It advertised its electric welded muffler as safer than conventional mufflers. Expert evidence showed that the continuous weld was more leak proof but there was no danger of carbon monoxide gas leaking from any well made muffler. So the court of appeals found that the expert testimony sufficiently supported the advertising claim and vacated the FTC's cease and desist order. However, this opinion was not carried in *Matter of Ever Sharp, Inc.*<sup>109</sup>. "Ever sharp" ran an advertisement of his own Schick Krona Chrome blade with that of competitor's stain-less steel blade. The magnified pictures of these two types of blades showed after using these blades five times, the stainless steel blade gets more corroded and advertisers then asked the viewer to decide which blade he would prefer to use. The commission found that the corrosion that occurred after five shaves did not materially affect shaving performance and that the advertisement was therefore misleading.

Commenting on this judicial wavering, Stewart E. rightly observes:

there is no mechanical formula for deciding when a comparative advertisement is deceptive. The goal of FTC actions and policy should be to allow advertisers to

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108. *International Part Corporation v. F.T.C.*, 133. 2nd 883 (7th cir 1943)

109. 77 F.T.C. 686 (1970)

present as much potentially useful information as possible without encouraging the dissemination of false and misleading advertising. Even if the FTC policy is not always apparent, the mere fact of commission regulation may dissuade comparative advertisers from issuing less than truthful advertisements. Due to the relatively few comparative claims, which have been fully evaluated, however, the precise path which the commission's regulation will take, remains largely in the realm of conjecture<sup>110</sup>.

However, it is suggested that the insignificant comparisons should be declared as misleading otherwise an advertiser will focus more on insignificant comparisons and will derive benefit out of all proportions. This approach is more demanding in goods involving health and safety of the consumers.

Where an advertiser after truthfully stating the merits of the competing product, falsely embellishes his own, there is an unfair trade practice. This was laid down by the American Court in *Electronic Corp. of America V. Honey Well Inc.*<sup>111</sup>. However, in *B. H. Bunnco V. A. A. Replacement Parts Co.*<sup>112</sup> it was emphasized that so long as the origin of the substandard parts is clear to the buyer, it will not be an unfair method of competition. The Uniform Deceptive Trade Practices Act, 1964 which has been adopted by several American states<sup>113</sup> grants a cause of action both in

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110. Stewart E; The Law of Comparative Advertising: How much Worse is Better than Great, Col. L. Rev. Vol. 76:80 (1976) at 99.

111. 428 F. 2d 191 (1st Cir. 1970).

112. 451 F. 2d. 1254 (5th Cir. 1971).

113. The 1964 Act or its 1966 revision which made only minor changes, has been adopted in its entirety or in substantial part in Colorado, Delaware, Georgia, Hawaii, Illinois, Maine, Minnesota, Nebraska, New Mexico, Ohio, and Oklahoma. Connecticut and Florida adopted the Act for a period but have since repealed it in favour of individual state statutes.

case of disparagement and in cases where an advertiser misrepresents the quality of his own goods<sup>114</sup>. In India on the other hand although this issue has not been yet resolved either by the commission or by courts, nevertheless, such business practices shall be treated as unfair ones. Since an advertiser misrepresents his own goods, such misrepresentation will be no less unfair by mere fact that the advertiser fairly states the quality of his competitor's goods.

Price comparison has also posed many problems as there is no legal provision either in the MRTP Act, 1969 or in the CP Act, 1986 relating to the permissible and impermissible price comparisons. In America Price Comparison Advertising Code regulates three types of direct price comparisons.

- 1) Comparisons between the seller's price and the price at which the seller offered or sold merchandise in the past;
- 2) Comparisons between the seller's price and the price at which the merchandise will be offered in the future; and
- 3) Comparisons between the seller's price and that of a competitor. Where the comparison relates to a former price of the seller (e.g. formally priced at \$10.00 now \$8.00). The items compared must either have been sold or offered for sale at the price within the last 90 days immediately preceding the date of the advertisements. If the comparison does not relate to an item sold or offered for sale during the 90 days period, the date, time or seasonal period of such sale or offer must be disclosed in the advertisement. In any case, the code provides that no price comparison be made based upon ..... a price which exceeds ..... (the seller) ... cost plus normal mark up regularly used by him in the sale of such property or services.

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114. UDTPA section 3(a).

Where the comparison relates to a seller's future price (e.g. Now \$5.00 next month \$7.00), the future price must take effect on the date disclosed in the advertisement or within 90 days after the price comparison is stated in the ad. The stated future price must then be maintained by the seller "for a period of at least 4 weeks after its effective date, except where its compliance becomes impossible because of the circumstances beyond his control.

Where the comparison relates to competitor's price (valued at \$20.00 our price \$15.00), the code requires that the competitor's price must relate to goods or services that were advertised or sold in the preceding 90 day's period. In addition, the price must be representative of prices at which such consumer property is sold or advertised in the trade area in which the price comparison is made. The code also requires the seller to disclose that the price used as a basis for the comparison was not the seller's own price. Finally the code requires the seller to disclose conspicuously the general nature of the material difference in the property or services<sup>115</sup>. In England also the Consumer Protection Act, 1987 through section 21<sup>116</sup> provides guidance to determine permissibility of price comparison.

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115. See for detailed account of this code, Supra note 103.

116. See infra commentary on subclause (ix).

In India the Advertising Standards Council (ASCI) chapter IV, provides that the advertisements containing comparisons are permissible in the interest of vigorous competition and public enlightenment provided:

- 1) It is clear what aspects of the advertisers product are being compared with what aspects of the competitors product;
- 2) The Comparisons are factual, accurate and capable of substantiation;
- 3) There is no likelihood of the consumer being misled as a result of comparison, whether about the product advertised or that with which it is compared;
- 4) The advertisement should not unfairly denigrate attack or discredit other products, advertisers or advertisements directly or by implication;
- 5) The subject matter is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case.

The above guidelines do not have force of law. It is suggested that these guidelines be incorporated in the both Acts so as to enable the redressal agencies to assess objectively the trade practice in question.

Instead of making any precise claim, an advertiser may use such vague terms for instance, less than regular price, list or recommended price, competitive price, area price or he may claim that his price is special price or consumer can save money by buying his product. The question is how to determine the truthfulness of such claims?

In Canada many of the above terms were put to judicial gloss nevertheless, it is not easy to ascribe any standard meaning

applicable to all these situations<sup>117</sup>. The pragmatic approach is adopted in America in the FTC's statement of policy regarding comparative advertising wherein it has been laid down that the commission evaluates comparative advertising in the same manner as it evaluates all other advertising techniques. The ultimate question in such situations is whether or not the advertisement has a tendency or capacity to be false or deceptive. This is a factual issue to be decided on a case by case basis<sup>118</sup>.

### Interpretation of Advertisements

Traditionally, the legal control over the claims made in representation<sup>119</sup> revolve around the narrow goal of prohibiting false and misleading statements by asking whether a particular

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117. In *Eddie Black* (1962), 38 CPR 140 and *Allied Towers Cases* (1965) 15 Mc Gill LJ 654 "Regular price has been defined as the price at which it (an article) is ordinarily sold generally in the area in which the representation (as to regular price) is made. Similarly without assigning any meaning to the expression "list price" judge Sweet in *Allied Towers case* (1965) 15 Mc Gill LJ 654 held that the list price is not an unfamiliar term to retail buyers and that these people realise that retailer some times sell below their price. In *R. v. Becker*, (1963), 15 Mc Gill LJ 654. The Term "Save over" was held to be capable of more than one interpretation and held that the words "save over" \$100 coupled with the inclusion of the advertiser's price did not necessarily disclose an offence under section 33c notwithstanding the fact that the highest price at which such items had previously been sold was \$269, some what less than \$269 which was suggested by the ad. However, *R. V. Pattons place limited* (1968), 57 CPR 12 an opposite interpretation was given to the term "save over".

118. 16 C P R 14.15 (1980).

119. The words, representation, statement and advertisement have been used interchangeably here, although there is a well established difference between these terms see *Given v. C. Holland (Holdings) Pty* (1977) 15 ALR 439.

claim is false or true . This hardly serves now the purpose. As Boorstin puts it :

The broadest of the distinction which no longer serve us as they did, is the distinction between ' true or false; Well-meaning critics (including many in the advertising profession) Who say the essential problem is false advertising are firing volleys at an obsolete target ..... Advertising fogs our daily lives less from its peculiar lies than from its peculiar truths. The whole apparatus of Graphic Revolution has put a new elusiveness, iridescence and ambiguity into every-day truth in 20th century America<sup>120</sup>.

It has now been recognised that the aim of advertising is to provide consumers with product information which can operate on two levels; informative and persuasive. The informative context brings to the attention of a potential buyer the type of the commodity or service put to sale, its quality, serviceability, usefulness and price. The persuasive context of an advertising message refers to that part of the advertisement which attempts to translate latent wants on the part of an individual into an effective demand for goods, and service, encouraging the prospective customer to purchase a specific product or service advertised<sup>121</sup>.

The MRTP Act, 1969 and CP Act, 1986, before amendments in 1991 and 1993 respectively like other legislations<sup>122</sup>, confined legal control to "informative" level. The incorporation of

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120.Boorstin, the image (1962) 216-7 quoted by Trebilock in Consumer Protection in the Affluent Society (1970) 16 Mc Gill 263-282.

121.Cohen; Misleading Advertising and Combines investigation Act, (1969) 15 Mc Gill Law Journal 622, 626.

122.For instance Trade Practices Act, 1974 of Australia; Trade Descriptions Act, 1968 of England.

compendious words like "unfair method" and unfair or "deceptive acts" through the above amendments have widened the scope of the two Acts. There is now no reason not to censure a representation which falsely persuades the consumers to purchase for example the tooth paste which will make them more popular or sexually more appealing. This claim cannot be treated differently from a claim that it makes teeth 25 per cent whiter than any other brand or that it will prevent cavities<sup>123</sup>.

The consumers can be persuaded to purchase by a number of ways, one of them being testimonial advertising. This technique involves the use of a third party to vouch for the quality or efficacy of the advertised item. The endorsement can come from celebrity - usually in the sports or entertainment field (e.g. Sunil Gawasker advertising Dinesh & Vimal suiting, Kapil Dev sports shoes, Ms. Universe lilill soap and Ms World Hair shampoo). This endorsement can also come from an expert or group of experts who in the opinion of consumers occupy better position to evaluate the merits of the product.

These deceptive advertisements can raise numerous questions. For example is it misleading to use a celebrity endorsement if the celebrity does not really use the product? Is it misleading to disclose that celebrity is being paid? It is deceptive not to disclose that while some experts think that the product is desirable, others disagree.

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123. Howard and Hulbert, Advertising and the public interest; Staff Report to the Federal Trade Commission (1973) at 5. See for contrary opinion A J Dugan; Fairness in Advertising in pursuit of the Hidden Persuader; Melb. Univ. L. Rev. Vol.11, June 1977 at 66.



In India neither MRTP commission nor Redressal Agencies under CP Act had occasion to deliberate on these issues. In America, the Federal Trade Commission promulgated in 1975, the first of its final Guides on Endorsements and Testimonials in Advertising<sup>124</sup>. These guides can prove helpful to both, the MRTP commission and consumer fora for resolving issues relating to testimonial advertising.

Under these guides an endorsement must always reflect the honest opinions, findings, beliefs or experience of the endorser<sup>125</sup>. Advertisers are forbidden to present endorsements out of context or continue using them if they no longer have faith or belief that the endorser continues to subscribe to the views presented to the public<sup>126</sup>. Where the advertisement represents that the endorser uses the endorsed product, then the endorsement must have been a bonafide user of it at the time endorsement was given<sup>127</sup>. The payment or promise of payment to an endorser, however, need not be disclosed<sup>128</sup>.

Apart from guidelines, the Federal Trade Commission in *F T C v. Cooga Mooga Inc.*<sup>129</sup> held that endorser will be personally responsible for false claim. The implications of the order are

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124. 16 C.F.R. 255 et seq (1980), 4 CCH Trade Reg. Rep. 39,038 Additional guides were issued in 1980 See 45 Fed. Reg. 3870 (1980).

125. Id. 255.1 (a).

126. Id. 255.1 (b).

127. Id. 255.1 (c).

128. Id. 255.5.

129. 92 F.T.C. 310 CCH Trade Reg.Rep. 21,417 (1978).

significant because they provide a strong incentive for a celebrity endorser to independently verify the claims made in advertisements before being associated with a product. This principle can be applied in India also if any claim of endorser is found false. The informative content of advertisement has raised many problems for interpretation. Although there is consensus that the false and misleading ads are bad, few however, agree about how best to tell whether an advertisement is misleading. In the course of interpretation of ads, rules were formulated by various courts. An overview of these rules is as follows.

1. To determine whether a representation is misleading, it cannot be resolved by merely examining whether it is correct or not in the literal sense. A representation containing a statement apparently correct in the technical sense may have the effect of misleading the buyer by using tricky language<sup>130</sup>. Similarly a statement which may be inaccurate in the technical literal sense can convey the truth and sometimes more effectively than a literally correct statement. It is therefore, necessary to examine that does a consumer on reading the advertisement form a belief different from what the truth is?<sup>131</sup>
2. This consumer belief can be determined by two methods: (i) to ascertain the effects of the advertisement which the advertiser's handiwork will have on the eye and mind of the reader<sup>132</sup>. For example an advertisement might be deemed to be deceptive if it deceives some consumers by

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130. For instance the statement that tea rusk was made in Holland, Michigan may be true but the impression it conveys is that the product is of Dutch origin. *U.S. v. Schurman* (177 DCWD Mich 1910); The statement that an imported perfume was "bottled in U.S.A" necessarily implies that the blended mixture was imported, *Fioret sales C. v. F.T.C.*, 100 F 2nd 358 (CCA 2nd, 1938); Statement that a radio has two tubes without disclosing the fact that one did not function and was merely a rectifying tube is misleading. In the Matter of Radio wire Television, Inc 34 FTC 1278 (1942).

131. Supra note 67 at 1965. See also *F.T.C. v. National Health Aid*, 128 F. Supp. 340 342 (1952); *More-trench Corp. v. F.T.C.* 127 F 2d 792 at 795.

132. *F. T. C. v. Sterling Drug Inc*, 317 F. 2d 669 (2d cir 1963).

causing them to hold a false belief about the product. (ii) To ascertain the character of the advertisement, without explicit reference to the ad's effect on consumers. For example an ad is deceptive if it makes a factual claim and that claim is false. The Federal Trade Commission in United States and MRTP Commission in India have adopted this approach. Thus once a claim is identified to have been made in the advertisement it is then easy to decide whether that claim is true or false. However, it is a difficult task to determine which claims an advertisement can fairly be read as making. For this net impression test has been suggested which will involve inquiry in the advertisement in its entirety. In other words entire mosaic should be viewed rather than each tile separately<sup>133</sup>.

3. Once it is determined that a representation is misleading, it will be declared so only when it is material and capable

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133. Ibid, See also *Puxu Pty Ltd. v. Parkdale Custom Built Furniture Plight Ltd.* (1980) 31 ALR 73; *Henderson v. Pioneer Homes Ply Ltd.* (1980) 29 ALR 597 at 604; *Rolls-Royce Motors Ltd. v. DIA (Engineering Ltd.* (1981) 6TPC at 700-1; *Colgate-Palmolive Pty Ltd. v. Rexona Pty Ltd* (1981) 37 ALR 391 *Stuart Alexander Pty Ltd. v. Blenders Pty Ltd.* (1981) 37 ALR 161. For contrary opinion See Richard Craswell; *Interpreting Deceptive Advertising*, Bost Univ. L. Rev. Vol. 65 July 1985. at 676. The learned author opines that if the advertisement is viewed as making false claims, it will be banned as deceptive and consumers may lose the truthful information as well. But if the advertisement is viewed as making only truthful claims, it will be permitted to continue unchanged, and at least some consumers will continue to draw mistaken inference. This dilemma in his opinion could be resolved in several different ways. For example one approach would be to hold the advertiser responsible only for those inferences that were the fault of the advertisement itself, but not for those that were the fault of the consumer. This was adopted in fact by the author from the opinion expressed by Nelson and Hoyer, *In corrective Advertising And Affirmative Disclosure Statement; The potential For Confusing and Misleading the Consumer*, 46 J. Marketing 61, 70 1982; Another approach is to make greater use of consumer surveys to identify the beliefs which consumers actually form when exposed to the challenged ads. This view was expressed by Gardner in *Deception in Advertising: A Conceptual Approach*, 39 J. Marketing 40, 41-45 (Jan 1945) see also for the similar opinion, Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission* 17 Kans. L.Rev. 559, 561 (1969); However, Craswell has himself suggested that Law should select the meaning that will minimize the overall injury to consumers. Id at 677.

of affecting purchasing decisions<sup>134</sup>. In-accuracies in unimportant details will not be fatal<sup>135</sup>. The expression "material" is not to be interpreted in terms of value but rather degree to which the purchaser is affected<sup>136</sup>.

4. Where a statement is capable of bearing two meanings, one of which is true and the other false, the mere fact that one possible meaning is true will not necessarily prevent finding of deceptiveness<sup>137</sup>. However, where a statement can convey a secondary meaning, it may be allowed, even though the primary, original meaning could not be truthfully asserted, if it is shown that the word in fact has a secondary meaning to the general public<sup>138</sup>.

5. Since it is an overall impression of a representation which has to be taken into account, a representation standing alone may be treated as deceptive but due to the presence of qualification or, limitation such prejudicial effect may be erased<sup>139</sup>. However, qualification should be equally effective<sup>140</sup> and it must not directly contradict the

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134. See *FTC v. Royal Milling Co.*, 288 US 212, 216-7 (1973) (deceived into purchasing an article which they do not wish to buy); *Pep Boys-Manny, Moe & Jack, Inc v. F.T.C.* 122 F. 2d 158, 161 (3rd cir 1941) (makes the average purchaser unwillingly ..... purchase that which he did not intend to buy); *F.T.C v. Colgate-Palmolive Co.*, 380 US 374, 386 (1965) ('fact which would constitute a material factor in a purchaser's decision to buy').

135. Halsburys Laws of England (Ed. 4th para 1044& 1045).

136. *R v. Kellys on Seymour ltd* (1969), 60 CPR 24 at 26.

137. *Murray Space Shoe Corp v. FTC* 304 F 2d 270,272; *US v. 95 Barrels of Vinger*, 265 Us 438 443 (1924). In Australia it was held in *CRW Pty Ltd. v. Sneddan* 1972 AR (NSW) 17 that offering of used cars for sale on payment of low deposits was held misleading as to type of credit transaction involved and misleading as to the range of potential customers to whom such credit was available.

138, *F. T. C. v. Algoma Lumser Co*, 219 US 67, 80 (1934); *Howard Hunt Pen Co. v. F.T.C.*, 197 F.2d 273 (3d cir,1952).

139. *F. T. C. Sterling Drug Inc*, F. 2d 669, 675 92d Cir, 1963).

140. *J B Williams Co*; 3 Trade Reg. Rep 17, 339 at 22, 449 F.T.C. DKE. No 8547, 1965. It was made clear that the main wording must not imply that the limitation on the original claim is of little significance; similarly in *Feil v. F.T.C* 285 F. 2d 879 (9th Cir,1960) it was held that a claim made in layman's language is not effectively limited by technically phrased qualification.

original assertions or be so vaguely worded as to create further uncertainty<sup>141</sup>. The qualification must be atune with the pitch of the main statement<sup>142</sup>. In other words if an advertisement is in writing, qualification must be in the same bold letters as the main statement<sup>143</sup>.

6. The advertisement may be misleading because things are composed or purposefully printed in such a way as to mislead<sup>144</sup>. In case of advertisements, common law principle will apply to the extent that seller is not generally bound to disclose information which may be relevant to a prospective purchaser's decision but if he does speak on any given matter he is bound not to distort the information he gives by revealing only part of the truth<sup>145</sup>.
7. Consumer is considered to have been wronged when he does not get goods or service of the stated quality made in the advertisement. It is no defence that although the product was of lower quality than claimed it was still worth the price charged<sup>146</sup>.
8. Where an advertiser is making a claim which is not susceptible of objective proof for example a claim that the product will produce a subjective sensation which is a matter of taste or emotion and will greatly vary from person to person. In such cases physical factors which produce the sensation can be examined objectively. For example a claim that a cigarette was not irritating will be determined by a measurable fact i.e. whether irritating constituents are present in the smoke<sup>147</sup>.

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141. *Giant Food, Inc v. FTC*, 322, F.2d 977, 986 (D.C Cir, 1963), Cert. dismissed, 376 US 967 1964.

142. *American life and Acc. Ins. Co v. FTC* 255 F.2d 289 (8th Cir), Cert. denied 358 U.S 875 (1958).

143. University Publication, In the matter of UTPE No.23 of 1987, decided on 10th October, 1988.

144. See Sachar Committee's Report. at 263. See also Boots Company (India) Ltd. Bombay, UTPE NO. 401 of 1987 decided on 17.11.1988.

145. See generally Spencer Bower & Turner, Actionable Misrepresentation, (3rd ed) (1974), at 94.

146. Supra note 138.

147. *Liggett & Myers Tobacco Co*, 55 F.T.C. 354 (1958).

9. Since the findings of the MRTP Commission in *Society for Civic Rights v. Colgate Palmolive Ltd.*<sup>148</sup> that a representation is misleading if it has capacity or tendency to mislead, is even after the amendment to MRTP Act and CP Act, a valid exposition of law, so law will be violated even if no person was in fact induced to enter into contract as a result of that representation<sup>149</sup>. Moreover, it will also be irrelevant that any false or misleading statement was in fact corrected prior to any sale which has been made<sup>150</sup>. However, such correction will affect the cease and desist order or injunction which the Commission may otherwise grant<sup>151</sup>. There may also be palliation in the compensation which may be granted to the injured consumer.

10. When an advertiser is making a false or misleading claim. It has to be scanned in order to ascertain whether that claim is a promise, prediction<sup>152</sup> or opinion<sup>153</sup>. If it falls in the category of promise it should be declared false or misleading and not otherwise irrespective of the fact whether the promise made was

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148. (1991) 3 Comp LJ. 378.

149. *DG v. Body Wrap Company (India) P.Ltd.* UTPE No. 83/1986 UA No. 146 of 1986) decided on 27.11.1986.

150. The rationale of this principal which in American literature is called "first contact deception" has been explained in an American case of *CRW Pyt Ltd v. Snedden*, 1972 AR (N.SW) 17 in the following words; The evil in such cases is the bringing of people to the appellants premises by misleading statements. Once there, it may be true enough that they will be told precisely what transaction is available and the circumstances under which it is available. But then they are the captives of the advertiser and available to be persuaded to enter into some other transaction.....

151. In the matter of Super Computronics (p) Ltd (1992) 3 Comp LJ. 303.

152. In *Thompson v. Master touch TV series* (1977) 15 ALR; it was held that the prediction that "Should earn \$ 400 Per week minimum" did not constitute false statement.

153. In *DG V. Guinea Mansion* (1988) 2 Comp LJ at 144. MRTP Commission held that the expression "most artistic Jewellery" is not synonymous with the "best jewellery of the land". The term art is for human skill. Art finds expression in objects in which skill may be expressed. Art is something personal and every artist has its own style and design. It depends upon one's perception.

relating to present, past or future fact<sup>154</sup>.

11. The advertiser cannot assert the defence that the purchaser was contributorily negligent. Since consumer law is aimed at protecting unthinking, credulous, ignorant and gullible consumers, so they are generally assumed to be negligent<sup>155</sup>. Indeed, the commercial advertiser seeks to capitalize upon this careless approach of the consumers and thus induces them to purchase.

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154. However, in England the position is that a promise as to what a speaker will do at sometime in the future cannot be a false trade description under the Trade Descriptions Act, 1968. See *Beckett v. Cohen* (1973) 1 All ER 120. For a criticism of English cases see Milner, "The Rape of the Trade Description Act". (1975) 38 MLR 694. However, in Australia it has been made clear that this distinction cannot be applied while interpreting section 52 of the Trade Practices Act, 1974. See Goldring, "The Trade Practices Act" 1974 - 75 and the Law of Innocent Misrepresenting 1976 50 ALR 126 at 135-6.

155. *Belmont Laboratories v. FTC*, 103 F 2d 538 (CCA 3rd 1939).

# ***Chapter IV***

## **SPECIFIC CATEGORIES OF UNFAIR TRADE PRACTICES**



## FALSE OR MISLEADING ADVERTISEMENTS

Various forms of the false and misleading representations mentioned in the definition are not now exhaustive enumeration of the Unfair Trade Practices<sup>1</sup> in view of the amendments made in the MRTP and CP Acts. The language is couched in the words of widest amplitude. The scope of the definition is not only confined to the advertisements made through mass media but will equally apply to a single false or misleading statement made in the course of promotional activity of a trade . The statement made whether orally or in writing or by visible representation will be covered.<sup>2</sup> This includes assertions whether made by words written or spoken or by conduct . Thus a situation like in *Given v. C.Holland (Holdings) Pty ltd.*<sup>3</sup> will be well covered in which the

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1. The Supreme Court's opinion expressed in *Lakhanpal National Ltd. v. MRTP Commission* AIR 1989 Sc 1698 that the definition of unfair trade practice is not inclusive or flexible but specific and limited in its contents, is now no more valid after the amendments made in the Act.
  2. In *given v.C Holland (Holdings) Pty Ltd.* it was held that the representation involves an assertion whether made by words or conduct whereas statement is confined to only words spoken or written (1977) 15 ALR 439. See also *Pryon v. Given* (1980) 30 ALR 189.
  3. (1977) 15 ALR 439.
  4. R. K. Nayak, it appears, is of the same opinion. He has given two separate headings in his Book, one for false representation under which clauses (i) to (iv) have been discussed and another for misleading representations under which clauses (vi), to (vii), (ix) and (x) have been discussed, see R. K. Nayak, *Consumer Protection in India: An Ecological Treatise On Consumer Justice* (1991) P.313-333. However, It seems from the cases decided by the MRTP Commission that it has read the word "false" as including the misleading representation. See for instance *DG (I & R) v. Medical Hair Centre* (1988)2 Comp LJ 176; *Godfrey Phillips India Ltd. and Another*, UTPB No.260 of 1988 and IA No.740 of 1988; In the matter of; *Ivs Suzuki Ltd, Bangalore* (1992) 2 Comp LJ 251; In the matter of *Hindustan CIBA Geigy Ltd. Bombay*, (1993) 2 Comp LJ 361. The word "misleading" is expressly incorporated in section 3(a) of the Trade Descriptions Act, 1968 of England in addition to word "false" in section 3(1).

dealer was held liable for false representation when it was found that mileage shown on the meter of a used car was false. Similarly undisclosed mockups in television commercial to represent product which are distorted in normal transmission will also be covered. The pictures or cartoons promoting sale, supply or use of goods or services will also fall in the ambit of definition.

However, various sub-clauses of section 36 A and 2(r) of the MRTP and CP Acts respectively in which different forms of false and misleading representations have been incorporated are not properly worded. Sub-clauses (i), (ii), (iii) talk of representations which are false. Does it mean that if a representation is of the nature mentioned in these clauses which is not false but misleading, will be outside the purview of these clauses<sup>4</sup>. For example, a statement which is literally accurate but because of its ambiguity is likely to mislead will not be a false representation. Although it may well be argued that (1) false representation encompasses misleading representations as well (2) the words "unfair or deceptive acts" used in the main body of the definition are wide enough to include misleading statements also, then what was the need of retaining the word "misleading" in sub-clauses (vi), (ix) and (x)? It is therefore, suggested that in order to remove any doubt, sub-clause(i) be amended on the following lines;

"The practice of making any statement, whether orally or in writing or by visible representation which is false or misleading that".....

The word "falsely" used in clauses (i), (ii), (iii) and the words "falsely or misleading" used in clauses (vi), (ix), (xi) be omitted.

Clause (i) says that it is "the practice of making any statement", the word practice means repeated action; habitual performance or succession of acts of similar kind<sup>5</sup>. In short it must be more than one act. If this interpretation is given to the word "practice" then single act of representation will not constitute unfair trade practice. It is suggested that clause (i) be read with section (v)(ii) of the MRTP Act so that a single or isolated act of any person in relation to any trade is enough to stamp any trade practice as unfair, provided of course other characteristics are also found<sup>6</sup>.

The various forms of false or misleading representations enumerated in sub-clause (i) to (x) are discussed hereunder:

**Sub Clause (i)**

***False representation regarding the particular standard, quality, grade, composition, style or model of goods.***

This sub-clause (i) is based on section 53 of the Trade Practices Act, 1974 of Australia<sup>7</sup>. The word "particular" caused

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5. Black's Law Dictionary (5th ed).

6. MRTP Commission also expressed similar views in re Godfrey and Boyce Mfg, Corp Ltd. (1990) Comp. Cas at 229; see also CERC v. T.T.K Pharma Ltd (1990) 68 comp. cas 89; In the matter of Tvs Suzuki Ltd and Anr (1994) 3 comp LJ 595.

7. Section 53 (a) runs as follows; falsely represents that the goods are of a particular standard, quality, grade, composition, style or model or has a particular history or particular previous use. Section 13-301(7) of the Maryland Consumer Protection is also similarly worded which says represents that goods or services are of a particular standard quality or grade or that goods are of a particular style or model, if they are of another.

some doubt to Australian Courts about its scope. So suggestions were made to Swanson Committee<sup>8</sup> for its deletion. However, the Committee rejected the suggestions on the ground that such deletion might widen the scope of the clause so as to encompass general standard etc., which may create uncertainty as to its real import.

Suggestively speaking the word "particular" should be read as opposed to general. "Particular" connotes here a special attribute or feature of the represented goods. However, it cannot be interpreted independently but with reference to the context in which it will come into question. For instance a statement about the number of miles traveled by an used car describes a particular attribute of the vehicle and therefore, describes its particular quality<sup>9</sup> or where a car is labeled as Maruti car it will be false representation if the car is not of the particular quality maintained by the Maruti udyog or if a car dealer represents the superceded model as the latest it will be a false representation as to a particular model<sup>10</sup>.

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8. Swanson Committee Report, para 968.

9. Supra note 3.

10. In Dr.B.W. Roshan Kumar v. M/s Sipani Automobiles Ltd. 1992 1 CPR 326; Dr. Madan Roa v. M/s Sipani Automobiles Ltd. (1992) 1 CPR 357; Dr.S.C.Bembalgi v. M/s Sipani Automobiles Ltd. (1992) CPR 479; Dr.P.Soundars Paridan v. M/s Sipani Automobiles Ltd. and Anr. 111(1992) CPJ 393 cars were represented as having quality engine built with Japanese technology when in fact they were fitted with locally made defective engine. It was held in all the four cases that it is false representation as to standard, quality and performance. Similarly in CERC v. Karnavati Auto Ltd., UTPE 23/85 order dated 19.2.1987, the claim that consumption of moped is 90 Km per litre was found possible only in ideal conditions which are almost impossible to obtain. Hence a false representation as to particular quality of moped.

The components of sub-clause (i) are not mutually exclusive but overlap in many situations<sup>11</sup>. The MRTP Commission in a number of cases quite rightly held a representation false on more than one grounds<sup>12</sup>. For example if the composition of a product is not as represented it will naturally affect its particular quality and also standard. The word grade also denotes quality or value. Thus describing ice-lolly as 100% ice cream when it is manufactured from a material which is neither milk nor cream<sup>13</sup>, it is a false representation as to composition and to a particular quality which an ice cream is possessing. Similarly Dentobac Creamy Snuff when instead of refreshing as claimed, causes giddiness and other harmful effects because of its 35% to 45% tobacco contents which fact was suppressed, is an unfair trade practice both of composition and quality<sup>14</sup>.

The word "quality" is a subjective connotation. Therefore, those facts which may be taken into reckoning to determine the quality should not be false<sup>15</sup> for example to call old stocks as

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11. *Doolan v. Watlons Ltd.* (1981) ATPR 40-257 at 43-294.

12. For instance see *DG v. P. Parasmel & Co and ors* UTPE No.50 of 1988 decided on 7.9.89; *In re Hind watch* WD (1993) 1 Comp LJ 323; *Atul Dua v. Helvette Watch House*, Comp cas, 1990 Vol.69 357.

13. *DG v. Milk-foods Ltd.* UTPE No.292 of 1987 (IA No.79 of 1987) decided on 18.12.1987.

14. *In re Parag Perfumes*, UTPE No.283/1988 order dated 21.3.1990.

15. *In re Jindal Aluminium Ltd*, (1990) 1 Comp LJ 425.

seasons best sale<sup>16</sup>. The word quality is linked with the standard in the sense that the latter means general recognition or a type, model or combination of elements accepted as correct or perfect<sup>17</sup>. So it is the quality which sets the standard. To sell spurious watch as HMT quartz is a false representation as to quality as well as standard because HMT watches are known for their standard which has been set by its quality<sup>18</sup>. Not only this alone, using falsely ISI mark<sup>19</sup>. or "R Brand" which has not been registered under Indian Trade Marks and Merchandise Act<sup>20</sup> or using brand name of a company which has earned fame for its quality and standard<sup>21</sup> or using brand name similar to the one of a reputed company e.g. Vamal instead of Vimal, Relinage instead of Reliance, are all false representations as to quality and standard<sup>22</sup>.

Model is almost synonymous with style and denotes also design. The plain illustration based on model or style will be

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16. In the matter of Singhal & Bros New Delhi UTPE No. 211 of 1987 decided on 15.1.1988.

17. Black's Law Dictionary, (5th. Ed.).

18. In the matter of Sagar Electronics (1993) 1 Comp LJ 325.

19. Usha International Ltd. UTPE No. 62 187 decided on 18.11.87.

20. *Vinod Vithaldas v. India Shaving Products Ltd. and ors*; UTPE No.85 of 1985 CIA No.148/85 decided on 29.9.1987.

21. Godfrey India Ltd. and anr UTPE No.260 of 1988 and IA No. 40 of 1988.

22. *DG v. Paresmal Co and ors*. UTPE No. 50 of 1988 decided on 7.7.1989. However in an earlier case of re Manohar Cut Pieces Fancy Cloth Merchants UTPE No.30/1985 order dated 10.7.85 held that any infringement of Trade mark cannot be looked into by the commission as it falls under Trade & Merchandise Marks Act 1958.

a representation that a car is of a particular years model when in fact it is a model of an earlier year<sup>22a</sup> or to describe a watch HMT Kartik model when infact it is not or is HMT but not of Kartik model. It will also cover representation based on subjective test e.g. ready made garments of English or Japanese style<sup>23</sup>.

The word "quality" was incorporated in clause (i) through (Amendment) Act, 1991. Before this amendment the MRTP Commission had held in *DG (I&R) v, Food Specialists Ltd*<sup>24</sup> and *in re Food Specialities Ltd*<sup>25</sup>, that sale of a package containing contents of quality less than what is mentioned on the container may amount to a contravention of the Standard of Weights and Measures (Packaged commodities) Act or the rules framed thereunder, but the implementation of the said Act or the rules is not within the Jurisdiction of the Commission unless there is an unfair Trade Practice within the meaning of section 36-A of the MRTP Act. Now both MRTP and CP Acts have been armed with the power to stamp a representation as unfair trade practice if it falsely states particular quantity of the product. The word quantity will in-

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22a. *Ransley v Spare Parts & re condition Co Pty Ltd.* (1975) ITPC 219.

23. Hind Watch Co. New Delhi UTPE No.87 of 1990 decided on 18.9.90 See also re Export India UTPE No.34/1984 order dated 19.5.86.

24. (1987) 62 Comp Cas. 122 (MRTPC).

25. (1991) 70 Comp Cas. 569.

clude length, width, height, area, volume, capacity and number<sup>26</sup>. Since both, MRTP Act and CP Act are in addition to and not in derogation of any other law<sup>27</sup>, so there will be no conflict between these two Acts and the Standard of Weights and Measures (Packaged Commodities) Act.

In all cases mentioned under section 36-A(i) of the MRTP Act and section 2-r(i) of CP Act, the burden of proof is on the representator and not on representee in view of section 106 of the Indian Evidence Act, 1872 which makes it clear that if a fact is specially within the knowledge of a person, the burden of proving that fact is upon him. Thus where a person is claiming that his treatment is world famous, he has to prove it<sup>28</sup>.

#### Sub-Clause (ii)

**False representation regarding the particular standard, quality or grade of services:**

For sub-clause (ii) there must be a false representation regarding the particular standard, quality or grade and such representation must be relating to services<sup>29</sup>. So what is relevant for the interpretation of clause (i) holds true for clause

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26. See Section 2(3) of the Trade Description Act, 1968 of England.

27. See section 4 of the MRTP Act and 3 of the CP Act.

28. *DG. v. Manne Quins*, (1989) 3 Comp LJ 155.

29. This clause is similar to section 53(9a) of the Trade Practices Act, 1974 which is as follows: falsely represents that services are of a particular standard, quality or grade.

30. Section 2(r).



(ii) also. The word service has been defined under the MRTTP Act<sup>30</sup> as well as under the CP Act<sup>31</sup> as follows:

Service means service of any description which is made available to potential users and includes the provision of facilities in connection with the banking, financing, insurance, transport processing, supply of electrical or other energy, boarding, lodging or both, housing construction, entertainment, but does not include the rendering of any service free of charge or under a contract of personal service.

There was a controversy whether the term service should apply to goods only or immovable property also<sup>32</sup>. The Indian Express quoted the then Law Minister as saying that the housing is not covered but if housing activities amounted to rendering service, then it is covered<sup>33</sup>. The MRTTP Commission also made it clear in *DG (I&R) v. Mano Builders*<sup>34</sup>, that the word service defined in the MRTTP Act is confined to not only business relating to goods but also includes the provisions of any service relating to immovable property.

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31. Section 2(o).

32. I C Sexena is of the opinion that services relating to immovable properties are outside the purview of CP Act. See The Consumer Protection Act, 1986, A view Point, 30 JILI 321. 324 for contrary opinion see S.H.Azmi, sale of Goods and Consumer Protection in India 1992 at 240.

33. The Indian Express; July, 1987 New Delhi.

34. (1988) MRTTP Report 4. See also *DG(I & R) v. Nahid Co Housing Pvt. Ltd.* UTPE 331/88 order dated 6.4.1989; *A P Singh v. Capital Promoters Pvt. Ltd.* Comp. cas. Vol.73(1992) at 149. National Commission also came in agreement with MRTTP Commission in *UP Avas Evam Vikas Parishad (Housing Development) v. Garima Shukla* ICJ 7; *Luckhnow Development Authority v. M M Sood* F.A. No.10 of 1990; *Banglore Development Authority v. C L Jagannath* (F.A.No.42 of 1990); *Suman Chandra Jain v. UP Avas Evam Vikas Parshid* (1991) 1 CPJ 258. *Mrs Sneh Chadda v. Delhi Development Authority* (1991) 1 CPJ 13; *Lucknow Development Authority v. M K Gupta* SCJ 1994 Vol.1 at 103.

Although, in order to remove any doubt, service relating to housing construction was inserted in the definition through MRTTP (Amendment) Act, 1991, and real estate in the definition of service through CP (Amendment) Act, 1993, there are still innumerable services which may fall within the ambit of the definition but have not been expressly mentioned. In this connection the opinion of the Supreme Court in *Lucknow Development Authority v. M K Gupta*<sup>35</sup> deserves mention:

The provisions of the Act thus have to be construed in favour of the consumer to achieve the purpose of enactment as it is a social benefit oriented legislation. The primary duty of the court while construing the provisions of such an Act is to adopt a constructive approach subject to that it should not do violence to the language of the provisions and is not contrary to attempted objectives of the amendment.

The MRTTP commission passed cease and desist orders not only against those whose services found express mention in the definition but also against the provider of those services which can be read as implied in the definition by virtue of the word "any description" mentioned in the definition of service. Thus the cease and desist orders were passed against the teaching shops<sup>36</sup> for

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35. SCJ 1994 Vol.1, 103 at 110.

36. See in re India Education Centre UTPE No.368/88 decided on 6.12.88; In re Career College Bombay UTPE No.108/1983 order date 8.1.88; In re National Institute of Information Technology New Delhi UTPE N.226/88 order dated 23.3.88; In re Advance Degree College Jaipur No.333/1988 order dated 10.3.89; In re Shree Narayan Open University Qulon UTPE No.387/88 order dated 27.10.89; Indian Management Institute DG v. Indian Institute of Management Studies UTPE No 287/88 order dated 16.5.88; and In re Bhartiya Veterinary College Bangalore, (1988) 63 Comp Cas. 3.

making false claims. False claims of increase of height<sup>37</sup>, preventing baldness<sup>38</sup> or determining sex of an unborn child<sup>39</sup>, for removing white patches<sup>40</sup> and sex problems<sup>41</sup>, travel agency<sup>42</sup> and carrier of courier service<sup>43</sup> were also prohibited by the MRTP Commission.

**Sub Clause (iii):**

**False representation regarding any rebuilt, second hand, renovated, reconditioned or old goods as new goods;**

The object of this sub-clause is to prohibit any representation that the goods are new when in fact they are rebuilt, second hand, renovated reconditioned or old<sup>44</sup>. The word "new" does not have any fixed and rigid meaning<sup>45</sup>. The Molony Committee recommended that the "Trade description" formerly contained in the

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37. In *re M/s New Height* UTPE No.14/1985 order dated 1.4.1986.

38. In *re Manne Qunis* UTPE No.167/1986 order dated 20.7.89.

39. In *re Mrs Kamalesh Thaper* (1988) 64 Com. Cas. 109. See also *In re Ravi Foundation* UTPE Enquiry No.93/1986, order dated 4.7.1986.

40. *re Vaidya Sri Jawala Prasad*, UTPE No.245/87 order dated 5.9.1989; *re Shyam Ayurved Bhawn* UTPE No.470/1987, order dated 14.12.1990.

41. In *re Dr.N.D.Singh*, UTPE No.256/87 order dated 21.12.1990; *DG(I & R) v. Prakash Clinic* (1988) 63 Comp. Cas. 171.

42. In *re Pratap Travel* UTPE No.135/87 order dated 26.5.88.

43. In *re Overnite Express* UTPE No.120/88 order dated 6.10.88.

44. Sec.53(b) of Trade Practices Act, 1974 Correspond to clause (iii) of MRTP and CP Act. Sec.13-301(6) of Maryland Consumer Protection Act, 1973 provides; represents that the goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or second-hand.

45. In *re ABC Copiers Pty Ltd.* ATPC Annual Report, 1978-79.

Merchandise Marks Act (Now replaced by Trade Description Act, 1968) should include descriptions as to any goods being new in the sense of being "Unused"<sup>46</sup>. However, sub-clause (iii) is wide enough to include representation to claim unused but old goods as new ones, similarly representation like the one in *R v. Ford Motor Co. Ltd.*<sup>47</sup> where a car was described as new but infact had been damaged in the process of delivery and thereafter repaired and was as good as new, will be false<sup>48</sup>.

Since the word "new" has many meanings, it is not possible to determine its meaning unless read in the context in which it was used. To say goods are "as good as new" possibly suggests that goods are not new<sup>49</sup> or to say goods have been "sparingly used" means that goods are second hand<sup>50</sup>.

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46. Report of the Molony Committee on Consumer Protection (1962) Para 636.

47. (1974) 3 All ER 489.

48. In this case it was held that it is not a false indication as defined under section 3 of the Trade Description Act, 1968. However, this decision has been criticised on the ground that there are obvious difficulties if this decision is taken too far. Buyers can surely assume in the normal way that "new" goods travel from production line to retail outlet in Pristine condition. Any repair, however, skillful can affect the durability of goods. Brain W. Harvey et.al. The Law of Consumer Protection and Fair Trading (1992) at 365.

49. This was the observation of Trial Judge in *R v. Ford Motor company Ltd.* Supra note 203, but was rejected by Court of appeal. However, in India it seems that trial judge's observation holds good.

50. However, Karnataka State Commission in *Dr. Vasan v. S.L. Goswamy* (1992) 11 CPJ 954 held that the advertisement in news paper that the washing machine had been sparingly used suggests that brand is new.

similarly to advertise sale of "Fashion Foot Wear" suggests that the goods conform to the fashion currently in vogue in that area<sup>51</sup> and will not be old. The word "new" some times even connotes the meaning of "recent in design or model". Thus goods cannot be called as "new" where they have remained in the stock for such a period of time that their quality deteriorated or depreciated in value. Thus reduction sale of unused but old goods cannot be represented as reduction sale of new goods. However, what should be the maximum period after the expiry of which unused goods cannot be called as new, will vary from case to case. In Australia, the Trade Practices Commission was of the opinion that the maximum time limit may differ from case to case but as a general rule, provisions of the Trade Practices Act will not be infringed if claim of "newness" is made within six months<sup>52</sup>. However, later on it seems that the Commission did not consider it rational to adhere strictly to this limit<sup>53</sup>. There is a decision also in *Anand and Jhonson Pty Ltd. v. Trade Practice Commission*<sup>54</sup> which has indirectly disapproved the six months rule. In this case vehicle was assembled in Jan., 1975 and then sold in 1977 as "new". The use of word "new" was not considered as false representation. It is submitted that in such

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51. In the matter of M/S Heels, New Delhi UTPE No. 24 of 1984 decision on 4.2.1985.

52. Advertising Guidelines (Information Circular No.10) para 74.

53. Advertising and Selling (1981) para 342, 4.

54. (1979) 25 ALR 91.

Situations, no hard and fast rule can be laid down. It will depend upon the facts whether the article is slow moving or fast moving and on the customs or usage of trade.

Since the phrase "false representation" has been used in Sub clause (iii), it is doubtful whether the failure to disclose that the goods are reconditioned, renovated or second hand would itself contravene the said Sub clause. Since the primary aim is to protect gullible and ignorant consumer, the MRTP Commission and redressal agencies in such cases may read an implied representation that they are new unless anything said contrary. This also can be inferred from the ruling of the MRTP Commission in *re Bennett Coleman & Co Ltd.*<sup>55</sup> where the respondent in its publication series "Indrajal comics" brought out two comics, which were virtually copies of the one published earlier. This fact was not disclosed by the respondent and Commission held that it is an unfair trade practice of giving false impression that two comics are new which in fact they are not.

Sub Clause : IV,

False representation of Sponsorship, approval, performance, characteristics, accessories, uses or benefits of goods or services:

Like most acts <sup>of</sup> false advertising, misrepresentations relating to sponsorship, approval, testimonials, endorsements, awards and prizes as such were not actionable at Common Law<sup>56</sup>. The

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55. UTP Enquiry No. 29/1986 order dated. 25.8.1986.

56. Hendler, False and Misleading Advertising (1929) 39 Yale LJ 22, 35.

maxim consensus facit legem, communis error facit jus (consent makes the law, common error repeated many times makes law) held the field and courts were reluctant in granting relief except when they were convinced that what the defendant is doing, is such an imitation of complainant's trademarks as is reasonably calculated to deceive the consumers<sup>57</sup>.

Consumer legislations ignored the common law principles which could not keep pace with the changing patterns of sales promotions. Relief is now granted to the consumers not only in those situations which have been expressly mentioned but also which can be legitimately called as falling within the four corners of misleading practices.

In India false representation about the sponsorship approval, performance, characteristics, accessories, uses or benefits of goods or service is an unfair trade practice<sup>58</sup>. The word sponsorship means and presumes certain degree of responsibility as is imposed on the person sponsoring the goods or services for

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57. Centaur Co v. Marshall 92 F 605, 612 (CCWD Mo 1899) affd 97 F 785 CCA 8th 1899); Hoover CO v. Sesquicentennial Exhibition Ass'n, 26 F 2d 821 (DCED Pa 1928).

58. This provision is similar to section 53 (c) of the Trade Practices Act, 1974 of Australia which is as follows: represents that goods or services have sponsorship approval, performance characteristics, accessories, uses or benefits which they do not have. Maryland's Consumer Protection Act section 13-301(5) provides: represents that goods or services have sponsorship, approval, characteristic, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have. Section 14 of the Trade Description Act, 1968 of England also deals with the same issue.

the quality and characteristics of the goods or services of other person. Thus a person who sponsors the goods or services of other person in fact makes a certain promise, guarantee, pledge with regard to the standards and characters of the goods or services<sup>58a</sup>. The word approval provides an implied or express sanction, confirmation or commendation of the goods or services by the person who is claimed to have given his approval in respect of the goods or services<sup>59</sup>. However, here it has been used in the sense that a person is making representation that he has sponsorship or approval of the other which in fact he does not have. Thus where the management committee is not making any representation about the recognition of the school, it will not be a misrepresentation and unfair trade practice under this sub-clause, even though the school is not recognised<sup>60</sup>. It will be otherwise where a school is not recognised but is claimed to have been recognised<sup>61</sup>.

The word "approval" is wide enough to include testimonials endorsements, awards and prizes. It may be claimed that leading

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58a. R.K.Nayak; Consumer Protection Law in India, An Ecological Treatise on Consumer Justice; (1992) at 319.

59. U.K.Chaudhary "Unfair Practices and MRTP Act -- 111", Financial Express (New Delhi) Col. P.5, 16.2.1985.

60. *DG(I&R) v. Greenfield Public School and Anr.* (1991) 1 Comp LJ 163.

61. *In re Modern New Delhi Public School* UTPE No. 69/1988 order dated 23.2.1988. Also see *in re Indian Management Development Institute Noide* UTPE No.386/1987 order dated 28.10.1987.



academicians are in the Board of management of an Institution<sup>62</sup> or well known institution e.g. ISI has approved the product<sup>63</sup>. Similarly the so called third party technique, i.e. where a party-in-interest circulates propaganda allegedly attributed to independent groups, will be an unfair trade practice under this sub clause.

Place of origin if represented falsely will also be proscribed under this sub-clause. In India because of the standard products in the market, there is a definite consumer preference for the imported goods over the domestic one's. Not only this alone, foreign goods have become status symbol. So there is a strong temptation for the trader to give these items a foreign flavour and to capitalize the weaknesses of the unwary consumers, so, the MRTP commission has come down heavily on such practices. Thus it has refused to accept technical guidance equivalent to "technical collaboration" and declared a representation false in which the word foreign technology" was used when in fact goods were assembled in India<sup>64</sup>. The commission held that the technology would include the components and the technique of assemblage

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62. *DG v. Indian Management Development Institute*, (1988) 63 Comp. Cas at 133. See also *DG v. Management Professionals Association*, Comp Cas (1988) Vol.63 at 673.

63. *Usha International Ltd*; UTPE No. 62/87 decided on 18.11.1987; *In re Godfrey Philips India Ltd*, Comp Cas. (1988) Vol. 64 at 120.

64. *In re Kelvinator of India Ltd.*, UTPE No.58/1984 order dated 3. 6. 1985.

also<sup>65</sup>. However, *in re British physical Laboratories India Ltd*<sup>66</sup>, the advertisement was as follows;'' Sanyo of Japan joins with BPL India in an exclusive financial and technical arrangement to create BPL-Sanyo companies in India". The MRTP Commission held that the advertisement did not convey that already collaboration had come into existence or that respondent was going to manufacture electronic products under the brand name of BPL Sanyo. The word, 'to create BPL Sanyo companies in India clearly indicated that there was a mere manifestation of an intention'. It is submitted that the consumer laws are aimed at protecting gullible, fatuous, and unwary consumers who are not experts in grammar. Therefore, to say that the words''to create'' implies future intention will be beyond the comprehension of those to whom it is addressed. This fact is well known to the traders also. Otherwise there was no need to invest a handsome amount for advertising a product whose collaboration was simply a conceived idea which may or may not materialize. Even if the collaboration does not click, the lingering effects of the advertisement will coax the unwary consumers to purchase the product of the respondent on the assumption that it has the foreign collaboration. The better course was to order respondent to cease and desist from such advertisement and when collaboration becomes possible at that time he would be free to advertise. Where a trader is having collaboration

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65. (1992) 2 Comp LJ 172.

66. (1988) 111 Comp LJ Rev. 144.

with a foreign company which is known by its products, it will not be an unfair trade practice to use the company's brand name instead of the name of the company itself. This rule was laid down by the *Supreme Court in re Lakhanpal National Ltd. v. MRTP Commission*<sup>67</sup> in the following words:

The Mitsushita limited is not a popular name in this country while its products National and Panasonic are. An advertisement mentioning merely Matsushita limited may therefore, fail to convey anything to an ordinary buyer unless he is told that it is the same company which manufactures products "National" and "Panasonic" and there is no scope for any confusion on that score.

However, court added that it would be proper for the appellant company to give the full facts by referring to Mitsushita ltd. by its correct name and further stating that its Products are known by the names "National" and "Panasonic"<sup>68</sup>.

The supreme court although was of the view that the advertisement in question would not harm the consumer's interest<sup>s</sup> yet better course in the opinion of the court was that true facts must have been revealed to the general public. Thus the observation of the supreme court comes close to the opinion long back expressed by judge Learned Hand that "in such matters we understand that we are to insist on the most literal truthfulness. It is certainly true that puffing of this type is not necessarily trivial; businessman and advertising agencies spend a handsome

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67. AIR 1989 Sc. 1698.

68. Ibid.

amount in connection with these misrepresentations and it can be presumed that they do so with the intention of misleading consumer<sup>69</sup>. Keeping in view the observations of the Supreme Court and the opinion of the judge Learned Hand, advertisements propogating sponsorship or approval must be clearly worded and there should not be even an iota of doubt about such sponsorship or approval.

There will be a misrepresentation where a person claims that the goods are from a particular place when they infact are not. However, consumer must know the importance of the place of origin, e.g. to represent fruits of Himachal Pradesh as kashmiri fruits, shawl of any other state as a kashmiri shawl or a sari of any other place as a banarasi sari.

A representation as to performance or characteristics may be false in a wide variety of circumstances. Thus a false representation as to the durability of goods or as to the efficacy of the repair service will be caught<sup>70</sup>. False representation regarding the benefit or usefulness of goods or services will also infringe this sub clause<sup>71</sup>.

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69. *Movetoench Corp. v. FTC*, 127 F 2d, 79(CCA 2nd, 1942).

70. *Taperell, Vermeesh and Harland*, Trade Practices and Consumer protection, (3rd ed. 1983) 1459.

71. *DG v. National Egg Co-ordination Committee Pune* (1989) 2 comp LJ 161. The advertisement that "Just two eggs contain more protien than 6.6 Kgs apples" is a false advertisement as to usefulness of the product, Damaged hair come back to life again with the use of the given formula was held also false representation as to usefulness of the product in *DG (I&R) v. Manne Quins Bombay* (1989) 3 Comp LJ 153.

The Australian Trade Practice Commission has issued Advertising Guidelines in which it has been made clear that no representation regarding the performance, characteristics, uses or benefits of goods or services should be made unless they could be demonstrated by tests based on recognised testing methods or by a survey of usage under normal conditions in a reasonable period<sup>72</sup>.

It is suggested that the MRTP Commission and National Commission should be empowered to issue similar guidelines. Such guidelines will reduce the work load and will in practice act as a preventive measure so that the advertisers product claim do not violate sub clause (iv).

Regarding accessories, a claim for example that all models are accompanied with accessories when infact they are not<sup>73</sup> or to represent in the advertisement that the goods are accompanied with accessories which are infact available only at an additional cost, will be a false representation unless that fact is clearly indicated<sup>74</sup>.

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72. Advertising Guidelines (Information Circle) Para 85.

73. *Evn v. Mazda Motors Sales Pty Ltd.* (1977) 2 TPC 37.

74. See TPC representation that goods have accessories which they infact do not have (Information Circular No.4); Advertising and selling (1981) para 223, 309.

Sub clause (v)

Represents falsely that the seller or supplier has a sponsorship or approval or affiliation:

This sub clause overlaps to a certain extent with sub clause (iv). Unlike sub clause (iv), here, sponsorship or approval must be with reference to seller or supplier himself<sup>75</sup>. The word 'affiliation' used in this clause is akin to sponsorship or approval and seems to require a positive link<sup>76</sup>. It appears that affiliation can be distinguished from the approval in the sense that the former implies a continuous link whereas the latter is a one time affair<sup>77</sup>.

Most cases in which the advertisement falsely identifies the enterprise from which the product allegedly originates involves passing off, mis-appropriation of a reputable trade name or misrepresentation of bussiness status<sup>78</sup>. The origin of the product is normally regarded as one of the indicis of quality and it

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75. This clause is similar to clause (d) of the Trade Practices Act of Australia which runs as follows: represents that the corporation has a sponsorship, approval or affiliation which it does not have. See also Marylands Consumer protection Act 1973 clause (5) of section 13-301, Supra note 3.

76. *Mc Donald's System of Australi Pty Ltd.V. Mc William's Wine Pty Ltd.* (1977) 28 ALR 236.

77. *In India TV Manufactures Association V. pieco ELectionics and Electrical Limited* UTPE No: 63/85 (IA No: 15/87; p.No:10/86 in IA No:47/85) decided on 4.10. 1987, MRTP Commission held that the respondents representation that he is an affiliate of the foreign company N V phillips Hollad is not false as about 39.70 per cent of shares were held by the latter.

78. Rudolf Callmann; *The Law of Unfair Competition Trade Marks and Monopolies* 3rd. Edition 1971, Vol. 1 at 736.

is the association between the two that often stimulates demand<sup>79</sup>. Of course that entity with whom association is attributed must enjoy that kind of goodwill which will lure the consumer. In India this practice of showing false association particularly with the foreign enterprises is rampant. Not only traders falsely represent their association in one way or other with some foreign and well known enterprises<sup>80</sup> but the most disturbing is that the fake educational institutions very rightly called as "teaching shops" resort to such practices<sup>81</sup> and thus play with the career of the unemployed youth. The MRTP Commission has held

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79. *American Automobile Association, Inc v. Spiegel*, 101 F Supp. 185 (DCEDNY 1951).

80. For instance see re Enfield Electronics Ltd. and Raghvendra Enterprise Trichy UTPE No. 312/1987 order dated 23.10.1989 representing falsely that his TV sets were made by the world famous Enfield company in collaboration with the Japanese Toshiba Company; In re Electrex India Pvt. Ltd. & Anr. UTPE No.357/1987 order dated 17.7.1989 respondent claimed falsely that it had foreign collaboration with Hitachi Company; In re National Radios and Electronics Co. Ltd. (1992) 2 Comp LJ 172 respondent made a false claim about the collaboration with Japan's Mitsubishi Company.

81. *DG (I&R) v. National Institute of Technology*, (1988) part III Comp LJ Rev. 1361 falsely claimed that it had entry level courses of American Universities under College credit programme and rated by University of Michigan, USA as being at par with those offered by American Universities; *DG (I&R) v. Instt. of Managerial Science & Technology* UTPE264 of 1988 (IA No. 43 of 1988) decided on 26.4.1988, respondent claimed that it was conducting MBA programme, of Clayton University (USA) which was recognised by USA, Department of Education; *DG (I&R) v. M P Association Comp. Cos* (1988) Vol.63 at 673 falsely promised awarding of post graduate and ph.D degrees through Correspondance from New York and Staton Universities of USA.

that imparting education is a service to the students by charging fees and cannot be described as a contract of personal service and the practice of imparting education is a trade practice within the meaning of section 2(u)<sup>82</sup>. Thus any false representation relating to recognition, affiliation etc will be declared as an unfair trade practice.

#### Sub Clause (VI)

**Makes a false or misleading representation concerning the need for, or the usefulness of any goods or services:**

Sub Clause (VI) is based on clause (f) of section 53 of the Trade Practices Act, 1974 of Australia which runs as follows:

makes a false or misleading statement concerning the need for any goods or service.

Commenting on the scope of this provision, Australian Trade Practice Commission <sup>83</sup> observed that the distinction must be drawn between a representation and a mere opinion. Where a statement though expressed in terms of need is infact the advertisers opinion and consumers are normally able to Judge the matter for themselves, this clause will not be violated. Although this is a correct approach and is applied in other cases of representations also, yet at times it will be difficult to draw a distinction. There are situations were a statement can be interpreted as a

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82. UTPE No 23 of 1987 decided on 10 october, 1988; *DG (I&R) v. Medical College of Alternative Medicines* UTPE No 279 1988 decided on /3.4.1988; In re National Centre for Computing Techniques Hyderabad (1993)3 comp. LJ 237

83. TPC Advertising and selling (1981) para 3 of 5-6.



statement of an objectively ascertainable need but where a person is possessing or is expected to possess, expertise in a matter in question, his advice as to whether goods or services are needed may be largely a matter of judgement or opinion<sup>84</sup>. However, by simply saying that the representor made opinion will not absolve him from the responsibilities unless he gives convincing reasons as to why he formed such an opinion and if he fails to do so, he has made a misleading statement "concerning the need for the service" recommended.

The word "need" has to be broadly interpreted and will be established if goods or services are desirable or preferable and the word "need" does not imply any notion of an imperative question or necessity<sup>85</sup>. A representation that in order to have child of one's choice (boy or girl), a pregnant women need the diet treatment offered by the respondent is a false representation as to need of the goods<sup>86</sup>.

The usefulness of the goods or services can be claimed in a number of ways and different techniques can be employed for claiming this usefulness. For example, inviting deposits by

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84. Supra note 70 para 1467 at 662.

85. *Keehn v. Medical Benefits fund of Australia Ltd.* (1977) 14 ALR 77.

86. *DG v. Ravi foundation, Bombay*, UTPE 93 of 1986 order dated 4.7.1986.

offering interest at an astronomical rates<sup>87</sup>, guaranteeing job placement after completing a particular course<sup>88</sup>, or treatment for some diseases by administering the medicine offered<sup>89</sup>.

**Sub Clause (VIII):**

***Warranty or guarantee not based on adequate or proper test:***

Guarantees perform promotional function for manufacturers, and are acting as a system of quality control where-by information can be obtained about the performance of the product<sup>90</sup>. This Sub Clause does not prohibit the practice of giving warranty or guarantee but requires that whenever such warranty or guarantee is given relating to the performance, efficacy or length of the life of the product, it must be based on adequate or proper test. However, no inkling has been given about the authority which

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87. *DG(I&R) v. Oriental Finance and Exchange Co. and Ors.* UTPE No. 54/87 decided on 15.7.1987. 30% to 38% interest was offered ranging between six months to 5 years; *DG(I&R) v. Punjab Farms & Forests Pvt. Ltd.* UTPE No. 240/86 (IA No. 51/87 decided on 8.8.1987, investment of Rs.31,000 would yield Rs.1,05,000 in cash or 65,000 in cash plus 1 acre of land after six years.

88. In the matter of National Centre for Computer Techniques, Hyderabad (1993)3 Comp LJ 236.

89. *DG (I&R) v. Dr. Singh (ND)*, Delhi No.360/87 and IA No.91/87 decided on 6.7.1989; *DG (I&R) v. Bhargav Clinic* UTPE No.1 of 1987 decided on 2.4.1987; *DG (I&R) v. Sri Nagarjuna Mulika Kutecram*, UTPE NO. 154 of 1987 decided on 31.8.1987; *DG (I&R) v. Prakash Clinic (R)* UTPE No. 250/87 (IA No. 69 of 1987) decided on 20.10.1987.

90. Ross Cranston, *Consumers and the Law*, (1978) at 143.

will determine whether the test is adequate or proper. What is adequate or proper test will vary according to the facts and circumstances of each case. Thus a statement that the moped has 90 kms per litre fuel consumption <sup>91</sup> is true but under ideal road conditions. So keeping in view the road conditions on which moped has to run, it can be held that the supporting test of warranty is not based on proper test.

The word warranty or guarantee it seems has not been used in the sense as defined under section 126 of the Indian Contract Act, 1872 but has been used here in a colloquial sense and perhaps in the sense as used by Lord Denning MR in *Oscar Chess Ltd. v. Williams*<sup>92</sup>. Which runs as follows:

In saying that he must prove a warranty, I use the word in its ordinary english meaning to denote a binding promise. Every one knows what a man means, when he says 'I guarantee it' or 'I warrant it' or 'I give you my word on it'. He means that he binds himself to it.

This clause will apply only when a warranty or guarantee given by a trader is not based on adequate or proper test. So where it is supported by an adequate or proper test but trader declined to fulfil the warranty or guarantee or had no intention at all to perform it, the subsequent clause will apply.

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91. *CERC v. Kamavati Auto Ltd. and Anr.* UTPE No.95 (1957) 1 All Ek 325 at 328.

92. (1957) 1 All ER 325.

It has been provided specifically that the onus of proof is on the person raising the defence that warranty or guarantee is based on adequate or proper test. This however, holds good for other representations also where a trader claims something which is specifically in his knowledge<sup>93</sup>.

**Sub Clause (VIII):**

***Materially misleading the public about the warranty, guarantee or promise***

This sub- clause speaks of a warranty or guarantee about a product or of any goods or services or a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result when it is either materially misleading. or there is no reasonable prospects that such warranty or guarantee will be carried out<sup>94</sup>.

Unlike previous sub clauses, the words "materially misleading" have been incorporated in this clause. Commenting on the import of the word "materially" a Canadian court in *R v. Patton's place limited*<sup>95</sup> observed:

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93. See also *DG v. Manne Quins* (1989) 3 Comp LJ 155.

94. Clause(g) of section 53 of Trade Practices Act, 1974 of Australia deals with the similar representations. However, Amendment Act, 1977 brought many changes in these provisions which now read as follows. Make a false or misleading statement concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

95. (1968), 57 CPR 12.

It is a representation which is calculated to, and in effect does lead a person to act upon it because he believes that this would be advantageous to him<sup>96</sup>.

Thus the word "material" does not connote the value to the purchaser, but rather the degree to which the purchaser is affected by these words in coming to a conclusion as to whether or not he should make a purchase<sup>97</sup>. Thus sub clause therefore will not be attracted where a representation is not material.

Since the doctrine of privity of contract rule which has roots in Common Law and also found place in the Indian Contract Act, 1872, was not incorporated in the CP Act, ~~these~~ warranties or guarantees under the Sale of Goods Act by virtue of the privity rule, remained ineffective and restricted, to ornamental lettering 'GUARANTEE'<sup>98</sup>, against the manufacturer vis-a-vis the consumer<sup>99</sup>. Under the CP Act complaint can be filed against the trader who has been defined in section 2(1)(q) as follows:

trader in relation to any goods, means a person who sells or distributes any goods for sale and includes the manufacturer thereof and where such goods are sold or distributed in package form, includes the packer thereof.

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96. Id. at 16.

97. *R v. Kellys on Seymour Ltd.*, (1969) 60 CPR 24 at 26.

98. *Adams v. Richardson & Starling Ltd.* (1969) 2 All ER 1221 at 1224.

99. This traditional rule in case of consumer sales was criticised. As one consumer body remarked: If the manufacturer relies on the consumer to be the final link in his quality control system, he must take the responsibility for ensuring that the customer does not suffer as a result : Editorial, 'Car Buyers warrant a New Deal', Focus, Vol.2, Sept. 1967, at 1.

The phrase "distributes any goods for sale" will include a manufacturer or wholesale dealer who although does not sell himself, employs somebody else, e.g. retailer or agent to get the goods sold. Therefore, he will be liable for any unfair trade practice including warranty or guarantee. And, under CP Act the plea of privity rule will not be available to him.

The word "Promise" used in the second part of this Sub Clause suggests more than a mere representation or statement. However, it seems that quasi judicial bodies under the MRTP and CP Acts will not demand any more standard of proof than is otherwise required <sup>in</sup> case of representation.

It is not clear as to whether this clause applies to a statement made after the time when a contract for the supply of goods or services has been entered into. One view is that since a guarantee or warranty, being a contractual assumption of obligations in respect of the subject matter of a transaction, it cannot strictly be said to exist before that transaction has been entered into<sup>100</sup>. However, keeping in view the general principles of law of contract i.e., the terms, in order to have a contractual binding shall be contemporaneous to the contract, a post contractual warranty or guarantee or promise may not have the binding effect. Also a trader is said to be liable for false warranty, guarantee or promise because his falsity had induced

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100. Supra note 70 para 1472 at 66.

the consumer to enter in to the transaction but when no such warranty, guarantee or promise was made at the time of bargain, how can it be said that consumer was induced<sup>101</sup>?

The warranty or guarantee may be given in a variety of ways in relation to goods and services and they are so broad as to be virtually meaningless unless qualified<sup>102</sup>. For instance if a person makes a representation that he fully guarantees a refrigerator. It is not clear as to whether in case of defect, will he replace it or only repair it. Whether only accessories replaced will be charged or charge for services will have to be paid? The period of the length of the guarantee is also not known and does he himself reserve the right to decide whether or not a claim is justified. In order to circumvent the possible misuse of these warranties, the Magnuson - Moss Warranty Act, 1975(U.S.A) requires that a businessman issuing a guarantee or warranty must clearly disclose certain basic information; i.e. name and

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101. See Surendrapal Pathak and Another, In re UTPE No. 78 of 1985 decided on 5.9.1987. Tractor guaranteed found defective, respondent did not honour his own guarantee; Fedders loyds Corporation (P) Ltd. In re UTPE No. 125 of 1986, decided on 2.11.1987. Air conditioner supplied with a warranty of due performance but respondent failed to fulfil the warranty of performance; Malviya Brothers and ors, UTPE No. 248/86 decided on 11.11.1987 respondent did not render satisfactory free after sale service; *DG (I&R) v. Bombay Wrap Company (India) Ltd.* UTPE No. 83/1986 (IA No.146 of 1986) decided on 27.11.1986 guarantee about 2.5 Kg to 5 Kg weight loss by adopting respondents treatment. See also *DG(I&R) v. Waist Away* UTPE No.148/87 decided on 23.7.1987. *CERC v. Sherry Lohise Slimming Centre (P) Ltd. and Ors.* UTPE No. 23 of 1986, decided on 19.2.1987; *Sunder Singh Khosala v. Hindustan Protiens Ltd.* UTPE No.236 of 1987 (IA No.60 of 1987) decided on 19.6.1987.

102. Supra note 70.

address; the identity of those to whom it extends; the parts covered; What the guarantor will do, at whose expense must do and what expenses he must bear and exception if any<sup>103</sup>. The guarantee must be available to consumers prior to a transaction and it becomes legally binding on a businessman and cannot be disclaimed and modified<sup>104</sup>. In addition to the disclosure problems, the Act requires that the guarantees be clearly labelled as either "full" or "limited"<sup>105</sup>. It is suggested that clause(VIII) be amended so as to make necessary for the advertiser of goods or service who gives guarantee or warranty to disclose the nature, scope, duration and the circumstances under which warranty or guarantee will be available to the consumer of his goods or services.

#### Sub Clause (IX)

##### *False or misleading representations as to price*

This sub clause aims at preventing false or misleading representation as to price and covers the practice of making any statement which materially misleads the public concerning the price at which a product or like products or goods or services have been or, are ordinarily sold or provided<sup>106</sup>. The representation which is false or misleading must be relating to price.

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103. Section 102

104. Section 102(b)(1)(A) and Rule 702.

105. Section 103, 104 and 105 and Rule 700.

106. Section 53 (e) of the Trade Practices Act, 1974 of Australia is similar to sub clause (ix) which runs as follows: Make a false or misleading statement with respect to the price of goods or services; see also Maryland, Consumer Protection Act, 1973 Section 13 - 301(1) : makes false or misleading statement of fact concerning the reasons for existence of, or amount of price reductions.



However the word " price" has not been defined either in the MRTP Act or in CP Act. Section 4 of the Sale of Goods Act, 1930 has defined it in terms of money consideration. The English Consumer protection Act, 1987 defines it as follows:

- a. the aggregate of the sums required to be paid by a consumer for or otherwise in respect of the supply of the goods or the provisions of the services, accommodation or facilities<sup>107</sup>, and ;
- b. ....

The above two definitions are similar in so far as they define price in terms of money.

Sub section 4 (1) of the Trade Practices Act , 1974 (Australia) defines "price" as including a charge of any description. This definition is wider than the above two definitions and will cover the situations like the one in *Guthrie v. Metaro Food ply ltd*<sup>108</sup> where a false representation was made concerning the reduction in sales tax and not in price. Since in Australia, price includes a charge of any description, so there was no difficulty for the court to declare it as a prohibited practice. In India, it may be said that it is a representation concerning the sales tax and not the price. However, it may be argued here also that since sales tax is covered in the retail price of goods, a prospective consumer will consider it a reduction in the price which he has to pay and therefore, falls within the domain of sub clause (ix).

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107. Section 20(6).

108. (1977) 2 TPC 192.

This sub clause is silent on the means and methods which may be employed for making false or misleading representation to the consumers as to price.

Section 21 of the English Consumer Protection Act, 1987 which has replaced section 11 of the Trade Description Act, 1968 provides that an indication as to price is misleading when;

- 1.the price is less than in fact it is. This covers all the common situations where prices purportedly reduced are charged at full price.
- 2.in effect, the price purports to be unconditional whereas in fact it is conditional.
- 3.the price covers matters in respect of which an extra charge is in fact made
- 4.the price is to be increased or reduced or maintained when the person giving the indication has no such expectation.
- 5.the price is linked to factual information by reference to which consumers might reasonably be expected to judge the validity of relevant comparison with the price indication, and these facts or circumstances are not in fact what they are.

An indication is misleading as to method of determining prices when;

- a.the method is not what in fact it is
- b.the applicability of the method does not depend on the fact or circumstances on which its applicability does in fact depend.
- c.the method takes into account matters in respect of which an additional charge will in fact be made.
- d.the person who in fact has no such expectation.
  - i) expects the method to be altered (whether or not at a particular time or in a particular respect);

or

- ii) expects the method, or that method, as altered to remain unaltered (whether or not for a particular period); or
- e. the facts or circumstances by which the consumers may judge the validity of any relevant comparison are not what in fact they are.

Since sub clause (ix) is broadly worded with out being clear as to its precise import, the above provision will prove a useful guide in interpreting this sub clause. As said, sub clause (ix) is wide in scope and will cover representations of different types. Thus it will cover not only comparative statements about one's own products e.g. previously for rupees 100 but now for rupees 75 but it will also cover a comparative statement about the price of his competitor e.g. our price 100 elsewhere<sup>109</sup>. Similarly a situation where price comparison is correct but quality of the two products is different, will also be caught by this sub clause. The statement about the price reduction may not be false but nevertheless, misleading when the price reduced is so insignificant that had it been disclosed to customer he ought not to have purchased the product. Similarly a statement made by a trader with out any plausible reason for example prices now reduced by 10%, buy before the prices return to normal will be a misleading representation under this sub clause . Making a plain

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109. *Achal Kumar Galhotra v. Byford Motors Ltd. and Anr.* (1991) 72 Comp. Cas at 702, representation was Padmini car at Rs.28,000 less than Maruti, although two cars were of different descriptions, the price of Maruti car stated was also false.

representation that the transaction will be advantageous<sup>110</sup> when in fact it is not or an ambiguous representation will although, be not false, nevertheless misleading under this sub clause. Giving impression that the price advertised is the net price but in practice charging extra for installation or for extra accessories will be covered by this sub clause.

A special offer impliedly promises more favourable terms than the offerers' usual terms. It will be misleading if the seller's usual price is falsely represented as a specially reduced price. The making of false claim of special terms, equipments or other privileges or advantages<sup>111</sup> will also be covered under this sub clause. Pre-ticketing which involves a representation usually on the package or the article itself about the retail price substantially higher than the actual price to the consumer will be caught by the sub clause<sup>112</sup>. Other practices which are in vogue in India are festival discounts<sup>113</sup>. Off season discounts<sup>114</sup>,

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110. In re Communications net work Ltd. (1986) 1 Comp LJ 185, goods falsely offered at irresistible price inclusive of duties and taxes was held to be covered under this sub clause.

111. No.16 in the list of unfair methods of competition; Annual Report of the Federal Trade Commission (1938) at 70.

112. *Helbros Watch Co. v. Federal Trade Commission*, 310 F 2d (CAD 1962).

113. Sarvodaya Khadi Bhawan UTPE No.289 of 1987, decided on 17.10.1988 falsely announced special rebate of 35% during Kali Pooja and Deepawali.

114. *Jay Engineering Works Ltd. v. Khaitan India Ltd.* (1994) 2 Comp LJ 157.

clearance sales<sup>115</sup>, manufacturer or wholesale prices and reduction sales<sup>116</sup> etc. These practices for the purposes of the MRTP Act and CP Act can be classified into two types. One, where no discount at all in fact is offered or offered but for a limited duration e.g. for two days or on an unimportant or insignificant items. Such practices will fall under section 36A (2) or section 2 (v) of the MRTP and CP Acts respectively. Another practice is to offer discount but on outdated or worn out products or impliedly promising that prices will be favourable when in fact they are not. Such practices are within the ambit of sub clause (ix). In order to remove any possible misleading impression which may be caused by such statements, the MRTP commission has laid down the following rule:

Where the discount is offered on such goods of standard quality just for the sake of publicity towards establishing one's goodwill, the mention of the quality, etc. may not be necessary; but, in other cases, where discount sale is necessitated by reason of off season, deterioration in quality, so on and so forth, non mentioning of that reason for the discount sale would be misleading in nature, and would have the effect of occasioning loss or injury to the consumer<sup>117</sup>.

Not only the mention of reasons for given discount are necessary but omission of other information may also attract this

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115. In re petal Boutique UTPE No.129 of 1986 decided on 1st.Feb., 1988, without mentioning so, it was found that respondents offer of discount was to clear off the old and out of fashion garments.

116. V.K. Indra Hosiery Industries, Delhi UTPE No. 204 of 1986, decided on 27.2.1988.

117. Supra note 115.

clause e.g. the value and quantity of discount offered; the original price, discount offered on the net price and duration of discount offer etc<sup>118</sup>.

Thus a representation will not fall under this sub clause if it projects purely comparative price statement about his own goods or services or about the goods or services of his competitor in objectively measurable attributes or price<sup>119</sup> (provided quality is same) in the relevant market<sup>120</sup>. The relevant market for the purposes of this clause will be the market in which goods of same description and quality are sold<sup>121</sup>.

When a person is raising the price for some period in order to advertise later on the price reduction, should such price reduction be called genuine or misleading?

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118. In fact this kind of information was sought by the MRTP Commission from the respondent for reaching to conclusion in *DG v. Intereraft South (Exports) (P) Ltd.* UTPE No.119 of 1987 decided on 26.2.1988.

119.F.T.C statement of Policy Regarding Comparative Advertising has approved comparative advertising which compares alternative brands on objectively measurable attributes or price and identifies the other alternative brand by name, illustration or other distinctive information. 16 CPR 14.15(1980) CF Chester Field oppenheim et.al, Unfair Trade Practice and Consumer Protection cases and comments American Case Book Series at 602.

120. Sub clause (ix) says that a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market...

121. MRTP Commission in one case held that it is to be ascertained whether sales are regularly conducted by it at pre-discount prices at other time. However, it is submitted that this proposition in no way takes into account the phrase "relevant market". Supra note 118.

In order to ascertain the genuineness of such representations, the American Federal Trade Commission issued guidelines wherein it was stated that such practices are deceptive unless it is shown that the further price was the actual bonafide price at which the advertiser had offered the article to the public on a regular basis for a reasonably substantial period of time<sup>122</sup>. However, later on the phrase "reasonable period of time" was replaced by the phrase "in recent past"<sup>123</sup>. The Trade Practice Commission of Australia has adopted the former view<sup>124</sup>, and in order to determine whether the period in question is a "reasonable period of time" various factors are taken into account including the frequency of price charged, the method of distribution and rate of turn over of goods and frequency at which the person acquired the services.

More objective test has been laid down in England. There the previous price should be the last price at which the product was available to consumers in the previous six months and goods must be available for at least 28 consecutive days in the previous six months<sup>125</sup>.

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122. Guides Against Deceptive Pricing 16 CPR 233 (1964), reprinted in Kintner, Primer on the law of Deceptive Practices (1971) Mac Millan PP.676-78.

123. Proposed Guides Against Deceptive Pricing 16 CPR (1974), Reprinted in Kintner, Primer on the Law of Deceptive Practices (2nd ed. 1978) Mac Millan, PP.76-78.

124. TPC Advertising and selling (1981) Paras 318 to 319.

125. 1.2.2 The Consumer Protection (code of Practice for Trade on price Indications) Approval order 1988 (S.I. 1988/2078).

Neither the MRTP Commission nor National commission or its subordinate commissions have found opportunity to dwell on this issue. There seems no reason not to adopted the English rule which is more objective and will ensure certainty in predicting about the representation in question.

### Sub Clause(x)

#### *Disparaging Goods or Services of Another*

Sub Clause(x) provides that it is an unfair trade practice to disparage the goods or services of another person by false or misleading facts<sup>126</sup>. The aim of advertising is to bring goods or services in the lime-light. This can be achieved either by extolling the attributes of the product or by manipulating the weaknesses of the product of the competitor. Both types of advertisements can be adopted so long as they are not false or misleading<sup>127</sup>. If they are false or misleading then they will be proscribed

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126.This provision is identical with section 13-301 (8) of Maryland's Consumer Protection Act, 1973 which runs as follows: Disparing the goods, services or business of another by false or misleading representation of fact;

127.In *re Ace Marketing Pvt. Ltd.* (1987) Tax LR 1792(30) MRTPC. However, there are two views about the comparative advertising; one view is that it is unethical and unfair because of its tendency to degenerate into name calling and unprovable assertions which damage the entire industries' reputation or because an underdog may use it unfairly to capitalize on the goodwill of a well established brand product to which it is not truly comparable, see N Y Times, Jan.21, 1973 at 15, col.1-5. The other view is that the comparative advertising is a desirable practice that enables the business concerns to challenge and deflate excessive advertising claims of their competitors. See Wall St. Jour, Nov.17, 1965, P.16, Col.1-2, Federal Trade Commission of USA is also of the view that comparative advertising is beneficial. (BNA, Anti-trust and trad Reg. Rep. No.555, A-20 (1970)).



and in such situation sub clause(X) will cover the advertisements of the latter category.

This sub clause censurs disparaging of goods or services of another person. Does it mean that the false statements Like "only air conditioner in India with Japanese compressor", will not be covered as the statement has been used without refering the name of any other company? It is suggested that the word "person" used in the sub clause should be dropped to avoid any doubt. However, it will not be incongruous to mention that the MRTP commission has not found himself fettered by the word " person"and has issued cease and desist orders even in such situations where advertisement does not refer to any person<sup>128</sup>.

.Sub clause (X) is wider in scope than sub clause (IX) in one respect i.e., under sub clause(IX) comparative advertising relating to only price is covered. Thus a false statement that only TV with foreign picture tube" will be covered under sub clause (x) but not under sub clause (IX). but on the other hand statement showing previous and present position of the price of the trader's own brand will be covered under sub clause(IX) but not under sub clause (X).

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128 .See In *re Pieco Electronic & Electricals Ltd.* UTPE No.71/1987 order dated 8.11.1988, statement claiming only Philips gives the full bulbs whereas other bulbs were half; In *re Novapan India Ltd.* UTPE No.9/86 order dated 24.6.1988 claimed that Novapan was the only pre-liminated particle board in the country; In *re Competent Motors* UTPE No.168/1988 order dated 11.12.1986 statement was that the facilities provided by the respondent, dealer of Maruti Udyog Ltd. were provided only and only by him. In all these cases it was held that the respondents have violated sub clause(x).

The MRTP commission has taken almost a consistent stand that the advertisements of self praise e.g. calling the product as only real product<sup>129</sup>, or alsi<sup>130</sup> or only best<sup>131</sup> cannot itself lead to the conclusion that the impugned advertisement is disparaging the products of other unless it is shown that the facts are false or misleading which disparage the goods of other.

The MRTP commission in *D G(I&R) v. DCM Toyota Ltd*<sup>132</sup> held that it is essential to prove that the false or misleading facts are intended to disparage, denigrate or condemn the goods of any other person.

It is submitted that the liability under both the MRTP Act and CP Act, is irrespective of good or bad faith of the advertiser. The requirement of mens rea has been dispensed with even in the legislations imposing punishment in terms of imprisonment. The liability under the MRTP and CP Acts is strict. Furthermore, throughout the definition of unfair trade Practice, the test is

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129. In *Satinder Singh v. Zandu Pharmaceutical Works Ltd.* UTPE No.491/1987 order dated 7.12.1987, the commission held that a statement that my product is real does not amount to stating that the products of other companies are not real, so long there is no specific effort to run down other products.

130 In *M/s Zandu Pharmaceutical Works Ltd.* UTPE No.491/87 claim was that the respondent's product Zandu Chyawan Prash is "alsi" and it was held that the statement does not fall within the purview of sub-clause(x)

131. *DG (I&R) v. Milk food Ltd.*, Patiala, (1994) 2 Comp LJ 375 The use of superlative terms such as "best", "perfect", "purest", "sturdiest" cannot disparage the goods of the competitor.

132. *DG (I&R) v. DCM Toyota Ltd.*, New Delhi (1992) 2 Comp LJ 297.

not only to ascertain whether the actual loss or injury has been caused to the consumer but has the trade practice in question potential to cause loss or injury or is there any likelihood of loss or injury. So there is no question of reading mens rea in clause (X).

In *DG(I&R) v. Milk food ltd., Patiala*<sup>133</sup> the impugned advertisement claimed that the respondent's Ice cream was disparaging the ice cream of the competitor's who do not claim that their ice is 100% pure. The commission recorded the following reasons:

1. 100% is now being used to project or symbolise the quantity, standard or excellence of the product sought to be marketed. The term should not, therefore, be construed literally or commercially. Indeed it is similar to such terms as "best", "perfect" "purest", sturdiest, etc. Fortunately, however, such superlatives even though high sounding have ceased to impress the average customers who are now all too familiar with such hyperbols. At any rate these superlatives do not necessarily mean any disparagement to the product of the competitors.
2. It is not article of one time purchase, in matters of food and eatables, the average customer does not go so much by the labels, logo or slogans but the taste and the price of the item. He is guided mainly by the quality or standard, and of course, the cost of the eatables rather than any other things. As the adage goes, the test of the pudding lies in the eating.

It is submitted that the ruling of the MRTP Commission cannot be said as laying down any general rule which will form binding precedent for future.

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133. Supra note 133 at 374.

It cannot be said that the traders representing falsely their product as 100% in any respect, can go scot free. For example in ice cream cases, Food Adulteration Rules, 1955 prescribe following standard of its contents:

Milk fat	10.00%
Protein	3.05%
Total solids	36.00%

(Except that when any of the aforesaid preparations contain fruit or nuts or both then the content of milk fat shall be less than 8.00%).

Starch	5.00%
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It is only after conforming to the aforesaid standard, the manufacturer of ice cream can legitimately call his ice cream as 100% and not otherwise. Now if suppose without complying with the said standard, the manufacturer is calling his ice cream as 100%, is it not an unfair trade practice? Is in such situation also, commission right in saying that the word 100% is merely a "superlative hyperbol which cannot impress an average consumer"? Therefore, it is submitted that without dwelling on the issue of hyperbols and superlatives commission ought to have addressed on a precise question, i.e., whether the ice cream conforms to the prescribed standard or not.

It will be quite apposite to mention here that the commission in *re Eid parry Co. Ltd., Madras*<sup>133a</sup> did take the serious

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133a.UTPE No. 137 of 1987 decided on 15.2.1988.

note of the words "excellent quality" when the goods were found sub-standard.

The argument of the commission it is submitted is fraught with the tendency of taking back to the era of Caveat Emptor. It shifts burden from the advertiser to the consumer. According to the commission's opinion it is now the job of the consumer to see whether the product is upto the standard which he expected from the advertiser's advertisement and not the job of the advertiser to advertise the goods.

Like other advertisements, the advertisement alleged to have disparaged the goods or services of the other, should be read as a whole, the mosaic has to be read in entirety and not each tile separately, such statement cannot be read out of contexts<sup>134</sup>.

Where an opinion is expressed by some one not directly or indirectly involved with the product, the mere fact that his opinion has a tendency to disparage the goods of one competitor, will not be sufficient to attract sub clause (ix) and it will make no difference if that opinion is false as the requirement under sub clause (x) is that the disparaging statement must be adopted for the purpose

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134. Supra note 132.

of promoting sale, supply or use of goods or provisions of services<sup>135</sup>.

**Explanation to Clause (1):**

The Explanation appended to clause (1) runs as follows:

For the purposes of clause (1), a statement that is

- a) expressed on an article offered or displayed for sale, or on its wrapper, or container; or
- b) expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale, or;
- c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public, shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained.

The explanation cannot be construed as laying down the exhaustive list of the various forms in which the representation can be made. But this explanation has to be read with clause (1) itself which includes statement of all types whether made orally

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135. In re invest well publishers (P) Ltd. UTPE No.146/1987 order dated 5.10.88. Regarding the third "party opinion which has no link with the product directly or indirectly, it was laid down by justice Holmes in *Scientific Manufacturer Co v. FTC* 3rd Cir, 1941 124 F 2d 640 that "cirtitude" is not the test of certainty. We have been cock sure of many things that were not so... But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that other, poor souls may be equally dogmatic about someting else."

or in writing or by visible representation. So advertisement by means of banner, cards, cinema slides, handouts, hoardings, broadcast on radio, etc., would very much amount to statement although not mentioned in the explanation<sup>136</sup>.

This explanation it seems has cleared the doubt about the possible application of principle of invitation to treat in such representations. Mere mention of price on the article may not be an offer<sup>137</sup> under the Indian Contract Act but by virtue of this explanation it will be a representation and representator will be amenable under the MRTP Act and CP Act for any false or misleading representation.

#### **Exceptions:**

At present, there is no exception provided under the MRTP Act or CP Act. The Sachar Committee had recommended following exceptions:

1. The afore said provision shall not apply if a person establishes --
  - a) that the act or omission giving rise to the offence was a result of a bonafide error; or
  - b) that he took reasonable precaution and exercised due diligence to prevent the occurrence of such error and that he took reasonable measures forthwith, after the representation was made, to bring the error to the attention of the class of persons likely to have been reached by the representation.

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136. See S M Duger, Law relating to Restrictive & unfair trade practice with consumer protection. (2nd. ed. 1992) at 373.

137. See for the difference between offer and invitation to treat, *Grainger & Sonse v. Gough*, (1986) AC 325, 334; *Pharmaceutical Society of Great Britain v. Boots cash chemists Ltd.* (1953) All ER 482 (CA); *State Aided Bank of Travancore v. Dhirt Ram*, AIR 1942 PC 6.

- c) in a proceeding for contravention of any of the aforesaid provisions committed by the publication of an advertisement, it would be a defence for a person who establishes that he is a person whose business it is to publish or arrange for the publication of advertisement and that he received it in ordinary course of business and did not know and had no reason to suspect that its publication would amount to contravention of any such provision.

These exception are analysed hereunder;

1. The first exception brings from backdoor the element of mens rea. As said already the liability under the MRTP Act and CP Act does not depend on the good or bad intention. Intention is totally irrelevant under the provisions of these Acts. He cannot be allowed to reap the benefits of the bonafide error. The Commission under the MRTP Act be well within the right to ask such representative to issue corrective advertisement so that any false impression created through such error will be erased. Again it will be appropriate to pass desist order against such persons so that similar error is not repeated and if injury is caused to consumer, he is compensated.
2. Where impugned advertisement was ceased prior to the launching of proceedings or where an advertiser gave an undertaking that he will not only discontinue it but will in future desist from causing it to publish, the MRTP Commission dropped proceedings against such respondents and thus recognized this exception without expressly saying so.
3. So far as third exception goes, till date MRTP Commission has not in a single case held an advertising agent liable even though this point has been raised in a number of cases<sup>138</sup>. There seems every reason for it. The definition of unfair trade practice provides that it is trade practice which for the purpose of promoting sale, supply or use of goods or provisions of any services". So advertising agent cannot be held answerable under the present scheme of things<sup>139</sup>. He cannot be said to have

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138. D. N. Saraf, Law of Consumer Protection in India (1990) at 113.

139. However, D. N. Saraf is of the opinion that there is no need of providing any statutory provision for holding advertiser liable. The advertising agent will be liable even under the present Acts. Ibid.



promoted the sale, use or supply of goods. He is definitely doing that but for someone else and that person who has caused the publication of the representation, is liable under these Acts. However, it is suggested that an express provision be made for holding the advertiser also liable but at present since the advertiser is not liable under these Acts, the question of providing an exception does not arise.

## BARGAIN OFFERS

In the not too distant past it was said that the two certainties in this life were death and Taxes. Today the old saw could be broadened to include advertising, taxes and death<sup>140</sup>. In order to survive in a competitive market, traders have to take help of the advertising. There is nothing wrong in it so long it is not false or misleading. When going becomes tough for the trader, he resorts to false or misleading advertisements. The varieties of such advertisements are innumerable as there is no end to ingenious techniques which businesses can invent. Without gain-say, figures are often more eloquent than words and an attractive price is sometimes more effective in inducing a sale than the quality of the article<sup>141</sup>. Thus the chances of duping a consumer by giving false or misleading figures, are more than by any other forms of false or misleading advertisement. This is the reason that one of the most intractable trading abuses of recent times has been the use of bait advertising. Such advertisements

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140. William G. Halinmet, et. al, Consumer Law, Text, Cases and Materials (1975) at 69.

141. Rudolf Callmann, The Law of Unfair Trade Competition, Trademarks Monopolies, 3rd. ed., (1971) Vol.1 at 745.

offer goods at attractive bargain prices, being goods which the advertiser does not in fact intend to sell in more than minimal quantities, if at all<sup>142</sup>.

The bargain offers are elsewhere in the world more popularly called as bait and switch sales. In America unlike other countries there is no specific provision dealing with the bargain offers, such practices are covered by the flexible section 5(1)(a) of the Federal Trade Commission Act, 1914 as amended by the Wheeler - Lea Amendment Act, 1938 which runs as follows:

Unfair method of competition in Commerce, and  
Unfair or deceptive acts or practices in Commerce,  
are hereby declared unlawful.

In America, bargain offer or bait advertisement is not taken in isolation but clubbed with switch sale as is evidenced by the decision in *House-hold Sewing Machine Co. Inc.*,<sup>143</sup>. The court said that our decisions relating to bait and switch are grounded on a factual determination that the

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142.Supra note 70 at 690-99.

143.76 F.T.C 207, 239 (1969). The Guides Against Bait Advertising defines "Bait and Switch" as an offer which is made not in order to sell the advertised product at the advertised price, but rather to draw a customer to the store to sell him another similar product which is more profitable to the advertiser. 16. C. F. R, See 238 (1970).

advertised product is not an offer which the seller seriously intends the buyer to accept, but a "Come on" which will lead to the sale of a higher priced product. The seller in order to woo the consumer to their establishment, offer the products at an extremely low price which does not intend to sell. When the consumer responds to the advertisement, the seller discourages him from purchasing the bait and instead tries to switch him to a higher price and more profitable item. To attract the consumers, advertiser creates false impression about the quality, quantity, model, style, durability etc of the goods and when the consumer turns up, the seller either refuses to demonstrate the advertised product or disparages it through words or acts, or by discrediting its guarantee, its credit terms, and the availability of service, repairs etc. It is a common experience that the consumer believes in what sales man says more than what his own eyes see. The sales man by virtue of his professional skill convinces the consumer that the product shown is far better than the advertised one. Since customers are psychologically prepared to spend their money once they are inside the store, they easily come in the grips of the sales man<sup>144</sup>.

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144. R. C. Mussehl, The Neighbourhood Consumer Centre, (1972) 47 Notre Dame L 1093, 1099.

The show of actual switching is not necessary but can be inferred from the surrounding circumstances<sup>145</sup>. This will naturally include bait advertising as without that switching is not possible. Hence, the commonly used phrase "bait and switch". Unlike, America, in India the MRTP and CP Acts contain a provision on bargain offers. The provision is similar to the one

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145. See Tashof v. F T C 437 2d 707. The F T C Guides in 16 C. P. R. See 238.3 (1988) do not demand show of actual switching. Nevertheless, the bait advertisement is a condition precedent for prescribing an advertisement as a bait and switch. Section 238.3 of the Guides reads as follows:

No act or practice should be engaged in by an advertiser to discourage the purchase of the advertised merchandise as part of a bait scheme to sell other merchandise. Among acts or practices which will be considered in determining if an advertisement is a bonafide offer are:

- a) The refusal to show, demonstrate, or sell the product offered in accordance with the terms of the offer,
- b) The disparagement by acts or words of the advertised product or the disparagement of the guarantee credit terms, availability of service, repairs or parts, or in any other respect, in connection with it,
- c) The failure to have available at all outlets listed in the advertisement a sufficient quantity of the advertised product to meet reasonably anticipated demands, unless the advertisement clearly and adequately discloses that supply is limited and/or the merchandise is available only at designated outlet,
- d) The refusal to take orders for the advertised merchandise to be delivered within a reasonable period of time,
- e) The showing or demonstrating of a product which is defective, unusable or impractical for the purpose represented or implied in the advertisement,
- f) Use of a sales plan or method of compensation for salesmen or penalizing salesmen, designed to prevent or discourage them from the advertised product. (However, these guides are only interpretive rules which do not carry the force and effect of Law).

incorporated in section 56(1) of the Australian Trade Practices Act<sup>146</sup>, 1974 and in substance similar to section 37(2) of the Combines Investigation Act, 1923 of Canada<sup>147</sup>. The provision is as under:

Permits the publication of any advertisement whether in any news-paper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain, or for a period that is and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement<sup>148</sup>.

A bare reading of the above provision makes it clear that it has a limited scope as compared to the American law on the subject. In India even if the trader disparages his own goods and thereby induces the buyer to switch over other item available at higher price and more profitable to the trader, he will not be covered under the above mentioned provision which will be violated only when the bargain offer is not so or is not available for a reasonable period or in reasonable quantities.

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146. This section provides : A corporation shall not, in trade or commerce, advertise for supply at a special price goods or services that the corporation does not intend to offer for supply at the price for a period that is and in quantities that are, reasonable having regard to the nature of the market in which the corporation carries on business and the nature of the advertisement.

147. This section reads as : No person shall advertise on a bargain price a product that he does not supply in reasonable quantities having regard to the nature of the market in which he carries on business, the nature and size of the business carried on by him and the nature of the advertisement.

148. Section 36 A(2) of the MRTP Act and Section 2(r)(2) of the CP Act.

In order to bring a trade practice within the proscription, it is necessary to show that the trader permitted the publication of the advertisement of such trade practice. The term advertisement has not been defined in the Act. It may be defined as a notice given in a manner designed to attract public attention<sup>149</sup> as by news papers, hand bills, television, bill boards and radio<sup>150</sup>. Thus the word advertisement is one of wide amplitude. Nevertheless, it will exclude representations made in sales talk at the point of sale. Thus for example, a door to door salesman who gains entry to a home by offering for sale a bargain priced appliance which in fact proves to be unsatisfactory in operation, but who just happens to have a better model in his car, would not be covered under the above mentioned provision<sup>151</sup>.

Since the word "advertisement" is wide enough to include labels on the goods or catalogues, then the question arises; are these labels on the goods or catalogues as "offers"? under the Indian Contract Act, such offers are merely an invitation to treat. Thus there are two possible interpretations. One is not to use the term offer here in a technical sense and not to insist on the dichotomy of the offer and invitation to treat. This will bring all that in the ambit of the term advertisement which might otherwise be excluded if the offer is given a restricted meaning. The other interpretation is to give offer narrow meaning in the sense as understood in the contract law. In an Australian case of

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149. *Edwards v. Lubbock County*, Tex.Civ. App; 33 S.W 2nd 482; 484.

150. *First Nat. Corp. v. Perrine*, 99 Mont. 454, 43 P 2d 1073, 1077.

151. *Supra* note 142 at 693 para 14105.

*Reardon v. Morley Food Pty Ltd.*<sup>152</sup> Smithers J held that the advertiser must take some positive action which constitutes the making of an offer on the terms specified in the advertisement and that he should at least during the advertised period of the offer publicise it to all and sundry at his chief place of business<sup>153</sup>. However, in England the price mentioned in the catalogues or in mail orders is considered as a price indication. If such price indication is false or misleading, the trader will be liable for penal consequences under the Consumer Protection Act, 1987<sup>154</sup>.

Once it is proved that the trader permitted the publication of an advertisement through news paper or otherwise, the next enquiry relates to his intention, it must be proved that the trader had no intention to sell the advertised goods. Although intention is an essential ingredient, yet it is not easy to ascertain. Furthermore, trader may escape responsibility by merely showing that the non-availability of goods for sale was due to reasons beyond his control. Since Indian Law is replica of section 56(1) of the Trade Practices Act, 1974 of Australia, dealing with the bargain offers, the difficulty of proving the requisite intention was encountered there also. In order to

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152. (1980) 33 ALR 417.

153. For criticism to this judgment see Supra note 151.

154. See para 1.2.5 of the Consumer Protection (code of practice for Traders on Price Indications) Approval order 1988 (S.I.1988/2078) read with Section 20(1)-(3) of the Consumer Protection Act, 1987.

overcome this loophole, Swanson Committee in its report<sup>155</sup> recommended that section 56 should apply to cases where advertiser in fact did not supply goods or services in accordance with his offer, irrespective of what his intention may have been at the time of advertising.

Keeping in view the recommendations, in addition to what was laid down in section 56, Sub-clause(2) was inserted in section 56 by the Trade Practices (Amendment) Act, 1977 which reads:

A corporation that has, in trade or commerce, advertised goods or services for supply at a special price shall offer such goods or services for supply at that price for a period that is, and in quantities that are reasonable having regard to the nature of the market in which the corporation carries on business and the nature of the advertisement.

Thus in Australia a trader cannot escape from the liability by mere show of absence of required intention. Failure of supply of advertised goods is itself sufficient for penal consequences. Since in India the chapter on unfair trade practice was introduced in the MRTP Act in the year, 1984 and CP Act was passed in the year, 1986, there is no plausible explanation for not incorporating section 56(2) of the Federal Trade Practices Act, 1974 of Australia in place of present section 36(A)(2) of the MRTP Act and section 2(r)(2) of the CP Act in order to dispense with the requirement of intention.

For the applicability of provisions dealing with the bargain offers, it is necessary to prove that the advertiser offered

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155. Swanson Committee Report paras 9.84 - 9.87.



goods at the bargain price. The term bargain price has been defined through the Explanation appended to respective sections. The Explanation has two clauses. Clause(a) says that the bargain price means a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise. This clause is ambiguous. It does not make clear as to whether the ordinary price is the price of the trader who has made a bargain offer, or any other trader. This explanation will not help also where a retailer who owns two or more outlets may, indicate in a shop A that an article was previously sold at a higher price when it was so sold only at shop B. This problem will be more acute if shop B is at a considerable distance away and possibly in an area where retail margins are normally higher than those in the area of shop A<sup>156</sup>. Clause (a) of the Explanation is also silent about the time during which the ordinary price should be in vogue. Thus runs the danger of unscrupulous traders raising prices today, lowering them tomorrow and then claiming price reduction. In England it has been made mandatory that the previous price should be the last price at which the product was available to consumers in the previous 6 months. The product should have been available to consumers at that price for at least 28 consecutive days in the previous months, and the previous price should have been in force for that period at the same shop where the reduced price is being offered<sup>157</sup>.

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156. See R. G. Lawson, Advertising Law (1978) at 165.

157. Part 1, para 1.2.2, Supra note 154.

Clause (2) of the Explanation provides that the bargain price means a price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold.

This clause is widely worded and unlike clause (1), even where there is no mention of actual reduced price, a trade practice will attract the provision when the advertisement is couched in such a way as to create an impression to consumers that the advertiser offers goods at bargain price. Thus the phrases like special prices, clearance sales, lower than other prices, whole sale prices will be covered under this sub-clause. However neither clause (1) nor (2) covers the advertisements like buy today for Rs.100 and not tomorrow for Rs.200 or buy now before price rise. These advertisements relate to future<sup>158</sup>.

The bargain offer will not invite proscription if it is true and lasts for a reasonable period and is available in reasonable quantities. In order to determine the reasonableness of the period and quantities, regard must be had to nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

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158. However a conflicting opinion was expressed by the MRTP Commission in *re polar Industries Ltd and Ors* UTPE No.120/86 decided on 22.1.1987. In this case off season discount of Rs.45/- offered on the sale of polar ceiling fans in 1986 was measured not on the basis of current price but with reference to the prices which were expected to rule in April, 1987. The Commission held the advertisement as unfair.

Till date the cases decided by the MRTP Commission involving bargain offers show that the Commission has invariably determined the validity of the bargain offers on the touch-stone of reasonableness of the period and the nature of the quality and in this process several rules have been evolved.

About the mention of the period during which the bargain offer shall last, the MRTP Commission came with the divergent opinions. In *re citylook New Delhi*<sup>159</sup> and in *re Heels*<sup>160</sup>, it was observed that the period during which the sale should be continued and hours fixed for sale should be reasonable. It cannot, however, be said to mean that the period during which the sale is to last should also be mentioned. There are no words in the aforesaid provision which lead to the conclusion that it is obligatory to mention reasonable period in the advertisement. As it appears, the only thing required is that the sale should be for a reasonable period and the hours of the sale should be reasonable having regard to the nature and size of the business, the nature of the market in which the business is carried on and the nature of the advertisement. However, on the other hand in *re Kailash Stores*<sup>161</sup>; *re Dayal Novelties and others*<sup>162</sup>; *re Smt Bharti Devi and Anr*<sup>163</sup>; *re Unique Department Stores*<sup>164</sup>; *re Roop Milan*<sup>165</sup> and *Deepak Agencies*<sup>166</sup>; the Commission

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159. UTPE No. 128/86 decided on 16.3.1989.  
160. UTPE No. 24/84 decided on 20.1.1987.  
161. UTPE No. 36/84 decided on 19.8.1986.  
162. UTPE No. 33/85 decided on 24.2.1986.  
163. UTPE No. 80/85 decided on 18.11.1986  
164. UTPE No. 96/86 decided on 9.2.1987.  
165. UTPE No. 134/86 decided on 6.3.1987.  
166. UTPE No. 412/87 decided on 24.11.1988.

declared bargain offer as unfair and one of the grounds was non mentioning of the period during which the offer would remain valid.

Although the provision dealing with the bargain offer talk about the reasonableness of the period which can be determined keeping in view the nature of the market in which the business is carried on and the size and nature of business, yet the Commission attempted to prescribe the period with exactitude and in this process conflicting opinions were expressed. In *re vasud Bros*<sup>167</sup> the bargain offer was relating to the sale of textile goods, reasonable period was held not to be less than 15 days. But in *re Panama Traders*<sup>168</sup> where again bargain offer was for textile goods, not less than 7 days were considered as a reasonable period. About the bargain offer involving readymade garments, the Commission in *re Unique Department Store*<sup>169</sup> and *re Snow white clothiers*<sup>170</sup> held that the offer should not be less than 10 days. It is submitted that the above opinions regarding the period during which the bargain offer should run, are not in conformity with the provision controlling the unfair bargain offer, for the following reasons:

1. The period may vary from case to case depending upon the nature and size of the business, quantity at sale and nature of the market in which business is carried on;
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167. UTPE No. 3/84 decided on 28.4.1986.

168. UTPE No. 35/86 decided on 17.9.1986.

169. UTPE No. 96/86 decided on 9.3.1987. See also *re Boutque*  
UTPE No. 129/86 decided on 1.12.1988.

170. UTPE No. 13/84 decided on 2.5.1986.

2. No hard and fast rule can be laid down regarding the reasonableness of the period, what may be reasonable period for a particular item may not be reasonable for another;
3. If the rigid rule about the reasonableness of the period is upheld, then even the bonafide bargain offers will fall within the proscription. For example, where there was a bargain offer for a limited sale which did not last for a prescribed period, the trader will be hauled up for not providing the goods in accordance with the offer.
4. Where for example bargain offer relates to the sale of 10 radio sets or 20 refrigerators, the question of prescribing a period does not arise and the offer shall remain valid till the last set is disposed of.

The MRTP Commission realising the impracticability and the resultant consequences of imposing any rigid "reasonable period", held in *re Roop Milan*<sup>171</sup> that a reasonable period of discount sale, having regard to the availability of the stocks and the daily turnover, shall be mentioned so that there is no necessity of extending the total discount sale period in dribblets. Even where the period is prescribed, it cannot be expected that a trader would undertake that the stock would last for that period because they may be cleared in a fraction of that period<sup>172</sup>. *Naturally it would be a good defence for the trader that the stock did not last for the period mentioned in the advertisement as the demand generated by the advertisement was more than the goods in stock which was not in the contemplation of the trader*<sup>173</sup>.

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171. Supra note 165.

172. Supra note 160.

173. Emphasis supplied.

Akin to the question of mentioning of the reasonable period, the MRTP Commission confronted with the question whether the reasonable period should be mentioned in the bargain offer itself or it will suffice that the bargain offer remained standing for a reasonable period although the same was not mentioned in the advertisement? The MRTP Commission, it appears, had no clear idea about the answer with the result opposite views were expressed at two different occasions. In *DG v. Nalli Silk Press and Ors*<sup>174</sup> the Commission opined that where the bargain sale announced was for a period from 3rd April to 6th April; but the same had been carried on till 20th April, 1987, the taint of unfair trade practice had been removed. But in *re Petals Boutique*<sup>175</sup> where bargain offer was made only for 3 days at the fag end of the July, 1986 but continued for subsequent month, the commission declared the bargain offer as unfair. It is submitted that it is the latter opinion which is in comport with the legal provisions. As the requirement of law is that the bargain offer should remain current for a reasonable period. What is reasonable period, depend upon the circumstances of the each case, the bargain offer and such period shall have to be mentioned in the advertisement itself.

Along with reasonableness of the period, the legal requirement is that the quantities put to bargain sale must also be reasonable. However, this does not mean that the seller must

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174. UTPE No. 107/87 decided on 5.6.19879.

175. UTPE No. 129/86 decided on 1.2.1988.

undertake to sell goods in a stated quantity but it simply implies that the seller must sell the goods at the bargain price in the quantities as reflected through the advertisement. It has been suggested by an Australian writer that the reasonableness must be determined from the point of view of the advertiser<sup>176</sup>. However, it is submitted that before reaching any conclusion, the advertisement itself should be scanned, obviously consumer and the seller will be holding two extreme views. The test therefore, should be to ascertain whether the supply was equal to one reflected by the advertisement.

The MRTP Commission however, has not decided cases on the test of reasonableness of the quantities, instead the Commission has given much weight to the insertion of the nature of qualities in the advertisement relating to bargain offer. It has in a number of cases<sup>177</sup> laid down that if the bargain offer is for old goods, used goods, out of fashion goods or new goods, the same must be mentioned in the advertisement, otherwise it will be misleading. Thus the Commission insisted on mentioning the reasons for the bargain sale in the advertisement itself. It did not endorse the point that where ever the discount offered is upto

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176. Donald and Heydon, Trade Practices Law, (Vol.2) 1979 at 632-33.

177. In re inter Shoppe (1988) 63 Comp Cas 286; re Smit. Bharti Devi UTPE No. 80/85 decided on 18.11.1986; re Kailash Stores UTPE No. 36/86 decided on 19.8.1986; re Heera Silk House UTPE No. 32/85 decided on 26.2.1986; re Dayal Novelties and Ors UTPE No. 33/85 decided on 24.2.1986; re Jasrabhai Shah UTPE No. 46/85 decided on 20.10.1986; and re Apachehjeans Pvt. Ltd. UTPE No. 104/86 decided on 20.1.1987.

50%, it shall be presumed that the goods on which the discount is offered shall not be fresh goods. The Commission observed:

The claim of the respondent that the customer was to be believed to be well-aware that the maximum discount of 50% could not be expected on fresh and quality goods, was not correct. This sort of awareness on the part of the customer as the respondent wanted to impute to him could not be treated as true. This rate discount might vary not only by reason of age of the unsold goods, it might also depend upon demand, off season, defects or otherwise owing to the necessity to clear the accumulated stock<sup>178</sup>.

### GIFTS, PRIZES, LOTTERIES, CONTESTS ETC.

Market strategies know no end as there is no end to the human ingenuity. Since man has not stopped thinking, so he continues to contribute to the development of designs and devices which promote the objective of manufacturer, producer, wholesale dealer, retailer and supplier i.e sale. The strategy makers are always in a hunt for new techniques and methods which are not only in tune with the tastes and needs of the consuming public but which have a potential to harbingers "wish" to purchase of the consumer to "will" to purchase. Since it is not so easy, so field studies have been undertaken to know the susceptibilities and behavior of the consumer. His urge resulting in his fickling has been studied at micro level. Nevertheless, since vagaries of consumer idio-syncrasy cannot be put into a strait jacket so it is not easy to predict consumer behavior at a particular point of time.

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178. re Skipper UTPE No. 80/86 decided on 3.3.1989.



Whether it is the case of introducing new product in the market or ensuring steady egress of the goods from the market, advertising has played an important and effective role. The most difficult task of placing a consumer in a mood to buy has been accomplished by advertising price cuttings, as the statistical figures have more potential to woo the consumer than the "words". Relatively recent in origin is the advertising of free gifts or prizes or conducting of contest, lottery, game of a chance or skill which are connected with the goods or services in such a way as to compel the consumer, in order to try his luck and be successful on the wheel of fortune, to purchase such goods or services. The hope of getting something for nothing is the most powerful bait. This attracts the customers, children, and adults alike. This is the lure that draws the credulous and unsuspecting in to the deceptive scheme<sup>179</sup>.

In order to eliminate possible misuse through these sales promotion schemes, consumer protection laws are in force throughout the globe including India.

In India, both MRT<sup>180</sup> and CP Acts<sup>181</sup> contain provisions to deal with the practice of offering of gifts, prizes or conducting of contest, lottery, game of chance or skill etc. This provision runs as follows:

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179. State V. Lipkin 169 NC 265 1936.

180. Section 36 (A) (3)

181. Section 2 (r) (3)

Permits:

- a) the offering of the gifts, prizes or other items with the intention of not providing them as offered or creating an impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole.
- b) the conduct of any contest, lottery game of chance or skill for the purposes of promoting, directly or indirectly, the sale, use or supply of any product or any business interest.

**Gifts And Prizes:**

A gift may be defined in a general way as an offer, or giving of something for nothing, contingent upon the purchase of the goods or services at a price<sup>182</sup>. The provision proscribes offering of gifts and prizes or other items when there is either no intention to provide them as offered or when they are either partly or wholly covered in the price charged but impression is created that something is being given free of charge..

In classical law of contract a distinction has been maintained between offer and invitation to treat. Latter is simply a request to other party to float offer which can ripen into contract only when accepted by the other. This distinction was

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182. Lyon, The Economic of Free Deals (1933) at 2.

approved in England in a number of cases<sup>183</sup> and was followed in India<sup>184</sup> also. Criticizing this approach Treitel observes:

customer may be induced by a window display to believe that they will be able to buy goods at exceptionally low prices and to wait outside the shop for many hours in such statement and the shopkeeper may turn him out at the very moment when the customer demands the goods<sup>185</sup>.

There is no clear cut inkling whether the word "offered" includes invitation to treat also. In Australia<sup>186</sup>, the stand taken by the courts is that offer for sale be read in an ordinary sense unless context otherwise requires and made clear that offer when used in a particular legislation does not necessarily have the meaning it does under general law of contract. Commenting on the import of

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183. See for instance: *Timothy V. Simpson* (1834) 6c and P 499 P 500, "If a man advertises goods at a certain prices, I have a right to go into his shop and demand the article at the price marked" Parke J said "No if you do, he has a right to turn you out. Similarly In *Fisher v. Bell* (1961) 1 Q B 394 it was laid down that the offence of offering a flick knife sale was not committed merely by displaying it in a shop window at a state price; In *partridge v. Crittenden* (1968) 2 All E R 421 it was stated that the offence of unlawfully offering for sale a live wild bird was not committed by inserting an advertisement in a news paper; similar views were expressed in *pharmaceutical society of Great Britain v. Boots cash chemists ltd* (1953) 1 Q B 401; *British car Auctions ltd v. Wright* (1972) 3 All E R. 462.

184. *State Aided bank of Travancore v. Dhirt Ram*, AIR 1942 pc 66 wherein bankers catalogue was not held to be offer see also *state of UP v. Vijay Bahadur Singh*, (1982) 2 Scc 365.

185. G. H. Treital, *The law of contract*, (4th ed 1975) at 9-10.

186. *Goodwins of newtown pty ltd v. Gurry* (1959) S.A S R 295, *Attorney General for New South wales v. Australian Fixed ltd.* (1974) 1 N.S.W.L.R 110; *W.A pines pty ltd v. Registrar of companies* (1976) W.A.R 149.

section 54 of the Trade practices Act 1974 (Australia)<sup>187</sup> which is similar to section 36 (A) (3) and 2 (r) (3) of the MRTP and CP Acts respectively the learned authors Taprell et al observe<sup>188</sup>:

The courts in Australia have been prepared ... to read such phrases as "offer for sale" in their ordinary sense unless technical sense is clearly required. It is therefore, unlikely that the English cases ... would be followed in the context of section 54, even though the common drafting practice of avoiding the problem by enacting an extended definition of offer has not been adopted in Trade practices Act. Moreover, regard must be paid to the context in which the word "offer" appears in section 54. An offer of gifts etc. may be made when no immediate offer for sale is in contemplation. An offer within section 54 may be made not only in connection with the supply or possible supply of goods or services, but also in connection with the promotion by any means of such supply.

It is suggested that there is no reason to deviate from the approach adopted by the Australian courts. Moreover, in India the liability of the trader for false or misleading advertisement goes only to the extent of discontinuing the advertisement. It is only when he repeats that<sup>a</sup>, the penal consequences ensue. So it is not possible to imagine a different interpretation than the one propounded by the Australian courts in the similar context.

The provision incorporates the words "prizes, gifts and other items". These words have attracted the attention of the

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187. Section 54 b provides : A corporation shall not, in trade or commerce in connection with supply or possible supply of goods or services or in connection with the promotion by any means of supply or use of goods or services, offer gifts or other free item with the intention of not providing them or of not providing them as offered.

188. Supra note 153.

authors in Australia<sup>189</sup> and it has been argued that since the word "items" when read ejusdem generis with prizes and gifts, means some tangible items and will naturally exclude the offers like sale of a car with the free after sale service. So to avoid it, "items" may be construed as a thing or an object in the list. Other-wise the scope of the section will be restricted which will not be supported by any plausible consideration. In India this will hardly cause any difficulty in view of the amendments carried in the MRTP & CP Acts in 1991 & 1993 respectively as the main definition of unfair trade practice contains the broad words "unfair method or unfair and deceptive practice". So in India even if the word "item" is read ejusdem generis with the words "prizes and gifts", the words in the main definition of unfair trade practice are wide enough to cover non tangible items also.

The intention of the trader to provide free gifts or prizes is necessary to determine the infringement of provision. However, it is not easy to ascertain the intention as it is said that even devil does not know human mind. So suggestively speaking, the Regulatory Agencies should overlook the intention of the trader, instead he may be allowed to raise the defences like there was an unexpected demand or supplier failed to supply goods etc.

A ticklish question arises when a trader makes an advertisement which seems an offer of free gifts or prizes but contains some onerous terms in fine print which are not easily

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189. See Donald & Heydon Trade Practices Law vol.2 (1976) at 621.

discernible as compared to the main advertisement. In Australia the Trade practice commission first held that by such advertisement section 54 is infringed<sup>190</sup> but later on deviated from this approach<sup>191</sup>. Authors have expressed conflicting opinions on it. One view is that in such situation it cannot be said that trader has not supplied goods "as offered". In other words there is literal compliance with the terms of the section<sup>192</sup>. Other view is<sup>193</sup>

It may be straining section 54 to read "offer" as meaning "offer" so far as the offer understands it. "offer" in the general law must be determined objectively; the last is whether a reasonable person in the offeror's position would think an offer has been made. The offeror, in not drawing attention to the fine print, excludes it from the offer .... Hence in our view failure to make full disclosure of the terms, in close proximity to the words suggesting "freeness" will lead to infringement of section 54.

#### Lottery, Contest, Game of chance, or skill.:

The provision dealing with the holding of lottery, contest game of chance or skill has not defined the term lottery. The Bombay lotteries (control and tax) and prize competition (Tax) Act, 1958 states that the term lottery does not include a prize competition. This definition also does not give an idea as to what should be considered as lottery.. In England Lotteries And Amusements Act, 1976 simply without providing any definition of lottery, provides all lotteries are unlawful. The term has been

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190. Advertising Guidelines, information circular No 10 (1975), TPRS 403,42 para 12.1 (c).

191. Advertising and selling (1981) para 403.

192. Supra note at 688.

193. Supra note 11 at 624.

put to judicial gloss. Hawkins J in *Taylor v. Smetten*<sup>194</sup> observed that in Webster's Dictionary, a lottery is defined <sup>as a</sup> distribution of prizes by lot or chance and Atkin J in *Scot v. D.P.P.*<sup>195</sup> held that any kind of skill or dexterity, whether bodily or mental, in which persons can compete, would prevent a scheme from being a lottery if the result depends partly upon such skill or dexterity. However, a qualification was added by Parker C. J. in *D. P. P v. Bradfute and Associates Ltd*<sup>196</sup> that the skill other than a mere colourable skill will prevent a scheme from being a lottery.

The essential requirements of the practice to be called as 'lottery' has been outlined by Madras H C in *Sesha Ayyar v. Krishna Ayyar*<sup>197</sup>, which are (1) A prize or some advantage in the nature of a prize; (2) distribution by chance (3) consideration paid or promised; and (4) risk of loss.

The elements of consideration and the risk of loss considered by the courts as essential requirements, provided an escape

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194. (1883) 11 Q. B. D. 207 see also *The News of the world Ltd v. Friend* (1973) All ER 422 at 424; *Hall V. Cox* (1899) 1 Q.B.148 at 200. A lottery for the distribution of prizes by lot or chance. *Emperor v. Gurbaksh* AIR 1934 Lah 840. A lottery is a scheme for the distribution of the prizes by lot or chance. It usually, if not always, takes the form of creation of a fund by the participation in the lottery. Who buy tickets or pay consideration of an offer by the promoters to award them a prize on some contingency, the happening where of depends on chance. In the matter of K. Karnakatee gala Enterprises UPTe No 7/86 decided on 5th March, 1988.

195. (1914) All E. R. Rep. 825

196. (1967) 1 All E. R. 112.

197. AIR 1936 Mad 225 (FB).

route for the trader who did not demand separate consideration for holding lottery, instead participation in the lottery was made contingent upon the purchase of some goods or services. When such practice was called in question, the trader pleaded that the consumer got his money's worth and he participated in the lottery free of any consideration. Similarly the risk of loss was evaded when lottery offered prizes of different denominations and whosoever participated in the lottery, got something of value and without any risk of loss.

In order to clog the loophole of consideration requirement the Gujarat Higher court in *state of Gujarat V. Mohandas Manumal* held<sup>198</sup>:

cases have arisen in England where purchaser paying the real worth of goods also gets a chance of a prize while purchasing the goods, in that case, the contention that the purchaser got the real worth of goods and therefore lost nothing and the chance of prize was wholly gratuitous stood negatived. *In Taylor v. Smethen* (1883) 11 QBD 207.

In the above case the appellant sold tea packets each containing a pound of tea at 2s. 6d. a packet. In each packet was a coupon entitling the purchaser to a prize and this was publically stated by the appellant before the sale, but the purchaser did not know until after the sale what prizes they were entitled to: and the prizes varied in character and value. It was found that the tea was good and worth the money paid for it. Still it was

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<sup>198</sup>. (1979) 20 Guj LR 226.



held that what the appellant did, constituted a lottery within the meaning of the statute.

The element of the "risk of loss" considered essential by the Madras HC in *Sesha Ayyar v. Krishna Iyer*<sup>199</sup> and followed in a *State v. Jayantilal Bhimjibhi*<sup>200</sup> was disputed in *State of Gujarat v. Mohandas Manumal*<sup>201</sup>, and was made clear that the risk of loss is not necessary and its absence cannot tilt scales in favour of the defendant. This was reiterated in *Wim Co Ltd v. Liberty Match Co and others*<sup>202</sup>.

### Common issues

A common question relating to offering of gifts, prizes or other items, and conducting of lottery, contest, game of chance or skill agitated before the various benches of the MRTP Commission is, what should be the criterion to determine the nature of such practices. Before amendments to the MRTP and CP Acts, the main definition of unfair trade practices in the concluding words provided..... 'adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise". Furthermore, section 36D of the MRTP Act<sup>203</sup>

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199. Supra note 197.

200. (1968) 9 GLR 603.

201. Supra note 198.

202. Comp. L. Digest, June 1991 Vol xx at 59.

203. There is no provision similar to section 36-D under CP Act.

provides that the commission shall pass any order under that section only when such practice is prejudicial to the public interest or to the interest of any consumer or consumers generally. This brought a vertical cleavage in the opinions expressed by various benches of the commission as they gave different reasoning in order to reach a particular decision.

In *DG(I&R) v. M/S Indian Sewing Machine*<sup>204</sup> *M/S ME Co Tronics Pvt ltd*<sup>205</sup>.; *Gujarat State Consumer Protection Centre v. M/S Food Specialities of India Ltd*<sup>206</sup>., it was held that the gifts or prizes offered were in fact covered wholly or partly in the price charged, which is prohibited under the MRTP Act. and in the latter case business practice was assailed also on the ground that the respondent had failed to provide the free cold coffee shaker as offered by it<sup>207</sup>. In *parle products pvt.ltd*<sup>208</sup> it was stated that the contest requiring purchase of parle poppin packets to the contestants is prejudicial to the public interest and to the interest of consumers generally as the contest promotes excessive use of sweets which create dental problems for consumers who are generally children and the most vulnerable section of

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204. U T P E No 122 of 1987.

205. Comp. L Digest (1986) Sept. Vol (xvi) at 34.

206. Comp L Digest (1993) June Vol (xxii) at 65.

207. Id at 68.

208. Comp. L Digest (1989) Sept. Vol (xix) at 51; *kochar oil Mills* in the matter of (UPTE No 53 Of 1985 decided in 15th Dec. 1987).

the society. Similarly in *M/S Ethnor limited*<sup>209</sup>, it was laid that the gift scheme devised by the respondent company for alluring the doctors to prescribe its child patients is apart from being highly unethical, an unfair trade practice, as it causes loss to the consumers as well as injury to the health of consuming public as the doctors while prescribing this product will take into consideration extraneous factors and not merely the quality and efficiency of the product.

An extreme view was propounded by a two member bench of M/S D.C. Aggarwal and M. Satyapal in *M/S Avon cycle pvt. ltd*<sup>210</sup>

It was laid down:

1. The question of loss or injury to the consumers by reason of impairment of competition or otherwise to be determined not from a narrow or limited point of view but from broader considerations governing our economic policy.
2. It is not merely a matter as to how the prize scheme was actually financed by cutting into the profits of the company or through an increase in the prices of bicycles. While this question is undoubtedly relevant, a more fundamental issue is, whether the trade practice of resorting to the contests, lotteries and similar methods which are increasingly being adopted by industry and trade, is in the right direction from the point of view of the healthy marketing techniques in this country, particularly in relation to promoting consumer and public interest.
3. India being a poor country, the endeavour of the manufacturers should constantly be to make available products of consistently high quality at low prices. Any practice which detracts from this basic consideration should be regarded as prejudicial to consumer interest.

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209. U P T E No.4 of 1986 Decided on 5.3 1987.

210. UPTE No 43 of 1984 Comp L Digest 1986 Sept. (Vol xvi) at 2p.

4. The practice of offering prizes by lottery tends to encourage the gambling instinct leading to unnecessary, avoidable and excessive purchases by consumers for the purposes of gaining entry in to the lottery. Such avoidable and excessive purchases are real loss to the consumer. As only a few ultimately win prizes. The bulk of the consumers end up, as in every gamble, suffering losses. The gain of the few is therefore at the expense of many. Instead of protecting consumer interest, lotteries and contests, therefore, clearly act in a prejudicial manner in regard to consumer and public interest;
5. The resources deployed for the prizes (which only a few can get) can be more optimally utilized for maximising consumer satisfaction through general reduction of prizes or better services.
6. Assuming loss or injury is an ingredient of unfair trade practice under section 36 A (3) (b) in the matter of giving away prizes by contests, lottery or game of chance or skill, it is to be noted that consumer interest is integral to any socio economic order especially under the MRTP Act and therefore, what deprives the consumer as a body or fairly large number of them, of the benefits from market affluence and competition, must be regarded injurious to the consumer.

The effect of the judgment is that all contests, lotteries and games of chance or skill, conducted for the purpose of promoting of the sale of any product as enumerated in clause 3 (b) of section 36A of the MRTP Act, 1969 are unfair trade practices<sup>211</sup>. The ingredient of loss or injury to the consumers (whether by eliminating competition or otherwise) as envisaged in the definition of unfair trade practice in the opening paragraph

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211. S.S Kumar; Contest lotteries and Games of Chance; Banned By one stroke; Not By law But By MRTP Commissions pronouncement. Comp.L. Digest (1986) sept. Vol xvi at 19.

of the said section 36-A are, according to the findings of the commission inherent in such lotteries, contests<sup>212</sup> etc.

However, it appears that one of the members of the Bench which handed down the judgment in Avon cycle case supra changed his opinion later on. In *M/s British Airways*<sup>213</sup>, M Satyapal observed that as a result of the contest there does not appear to have been any injury or loss to the consumers ..... Director General (R) has therefore concluded that the advertisement did not amount to an unfair trade practice and recommended that the matter may be dropped. We agree with this recommendation. Similarly S D Manchand in *M/s MECO Tronics pvt. ltd*<sup>214</sup> laid down:

The contests and prizes are sale promotion gimmicks luring consumers to purchase a particular brand by promises of illusory free gifts. These gimmicks are unrelated to any improvement in quality or in lowering of prices, the two considerations which alone could be of benefit to the consumers. A Country where a large majority of the consumers are poor, hapless or disorganised and where the market is generally a sellers market, the gift scheme covered under sub clause (a) and or (b) of sub section 3 of section 36 A, is a positive disservice to the consumers who may sacrifice the considerations of price and quality for illusory gains.

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212. The Same Bench of Colgate case in *M/s Oswal Mills ltd.* held that the conduct of any contest for the purpose of promoting directly or indirectly the sale, use or supply of any product or any business interest amounts to an unfair trade practice under section 36 A (3) (6) of the MRTP Act. UTPE No 25 of 1985. Decided on 27-3-1987.; In *M/s Kids Kemp*, UTPE No 419 of 1987, decided on 24-4-1989 it was held that the picking up of the red ball amongst white or yellow balls from inside the bag was a matter of chance. It was therefore, just a lottery or a game of chance. This is the trade practice which is injurious to the customers. See also *D G (I&R) v. H M M limited* UTPE No 94 of 1986 decided by D C Aggarwal and H C Gupta on 11th May, 1989.

213. UTPE No 124/86. Decided on 7-1-1987.

214. UTPE No 6 of 1985. Decided on 9.10.1986.

This Member also changed his opinion in *The Blitz publication and private ltd*<sup>215</sup> and *Miss Santosh Kalra V. Indian Book House pvt. ltd*<sup>216</sup>. and tried to find actual loss, if any, is caused to consumers by offering such gifts or prizes . Since they did not, so the Member declared that the practices in question are not hit by the section.

D C Aggarwal, the member of the MRTP commission who with out any wavering maintained from *Avon cycle case* (supra) to *Society for civic Rights v. Palmolive India ltd*<sup>217</sup> that contest lottery game of chance or skill are per se unfair, outlined the reason for this approach in *DG V. New life General Finance and investment Co ltd*<sup>218</sup>. it was observed:

1. A remedial statute like the MRTP Act is not to be equated with a penal statute in the matter of construing its provisions relating to "the conduct of any

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215. UTPE No/86/87 decided on 14.4.1988.

216. UTPE No 35 of 1988, decided on 22nd Nov. 1989. In mid day publications private ltd. U E No 50 of 1985 decided on 12.3.1986 and Competition Success Review pvt. ltd UTPE No 7 of 1985, there was no loss or injury to the consumers. So the practices were held not hit by the section In *Society for Civic Rights v. General Electric Company of India ltd.* UTPE No 389 of 1988, 19th Annual Report of MRTP commission at 83 it was stated that neither there is any loss of injury to the consumers or public at large nor there is any loss or restriction of competition. The holding of the contest has not at all increased the sale of the respondent and as such the contest had no effect upon the sales of the respondent and though the contest was organised to promote sale, it appears that it squarely failed in its purpose.

217. (1991) 2 Comp L. J. 372.

218. Comp. L. Digest (1987-88) Vol 17 at 71.

contest lottery, game of chance or skill. Herein, what is sought to be prohibited in the conduct of any contest, lottery, game of chance or skill for the purpose of promoting directly or indirectly the sale, use or supply of any product or any business interest. It is an object which has no relation or approximation to the underlying object of section 294 A of IPC.

2. The various ingredients provided in the preamble of section 36A are subject to dominant essential "unless the context otherwise requires". It is to be noticed that clause (b) of subsection (3) of section 36 A has been introduced in contradiction to clause (a) of this sub section.
3. It is, idle to invoke or lay emphasis on the language of clause (a) of 36 A and contend that it has never been the intention of the respondent company not to distribute prizes or gifts as advertised.
4. Clause (b) of sub section (3) which deals with the conduct of contest, lottery or game of chance or skill, takes its sweep any business interest besides the sale, use or supply of any product. The phrase, business interest is of wider amplitude and may include services and other activities of a commercial nature which don't relate to the sale, use or supply of any product.
5. Clause (b) of sub section (3) is an independent provision in section 36 A enacted for different context, the inkling of which is given by the caution "unless the context otherwise requires".
6. If there is anything as the rule of reason in applying the provisions of the statute to a particular situation, it will be travesty of fairness in business or commercial enterprise to dazzle the customer or consumer by promoting many fold costlier items than the value of item of sale and purchase itself so that the small cost of the item pales into insignificance and gets obscured by the glamour of chancing upon wining a fortune.

The opinion of D C Aggarwal Member MRTTP commission expressed in various decisions was affirmed by the Gujarat High Court in *Wim co ltd V.Liberty Match co & ors*<sup>219</sup>. Although Gujarat High did not negate "the loss or injury" as an essential element to call a

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219. Supra note 2.

trade practice unfair one, yet the court not only approved the opinion expressed in Ayon cycle case (supra) but also held that the elimination or restriction on competition cause loss to the consumer and contest, lottery, game of chance or skill have a potential to eliminate or restrict the competition. Thus it can reasonably be inferred that Gujarat HC also viewed section 36 (3) (b) as per se unfair. After these decisions, came landmark judgment of the MRTP commission in *Society for Civic Rights V. Colgate Palmolive India Ltd*<sup>220</sup>. This case was first heard by a two Member Bench. D C Aggarwal being one among them, He did not change his view point already expressed by him in a good number of cases. However, another Member H C Gupta came with an opposite observation. He stated:

A plain reading of the provisions clearly brings out the intention of the law makers to the effect that loss or injury is neither inherent nor incidental to such contests and such loss or injury has got to be proved by legal evidence<sup>221</sup>.

In order to resolve the conflict, Full Bench was constituted which made the following observations-

1. In some cases, it has been mentioned that the amount spent on advertising should be utilized in reducing the price of the product so that the consumer may benefit. This is a wrong approach to the problem of advertising. When to advertise, where to advertise and how much to advertise --- These are questions properly within the management of every company. It cannot be the subject matter of a judgment by the commission as to where and as to how much a particular company should advertise<sup>222</sup>.

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220. Supra note 217.

221. Comp L. Digest 1988 Dec. Vol (xviii) at 10.

222. Supra note 220.at 386.



2. Sub section (3) (a) (4) and (5) show that the practices mentioned in the said paragraphs are capable of or have got the innate quality of causing loss or injury to the consumer. These practices do not need to cause actually loss or injury in order to become an unfair trade practice. If this is the meaning in respect of the provisions which have been examined, why the same meaning cannot be attributed to clause (b) of paragraph 3 of section 36 A. The key phrase must mean the same thing for different paragraphs. It cannot mean one thing for one paragraph and different thing for another paragraph<sup>223</sup>.
3. In trade practices enumerated in section 36-A, loss or injury is implicit.

On the question why the key phrase "and thereby causes loss or injury "is in the preamble of the definition, the commission held,"our answer to this argument is that the insertion of the key phrase is the legislative style or device of making it know why it regards a trade practice which adopts any of the practices as an unfair trade practice. The legislature intended to convey that a trade practice which adopts one or more of the following practices has got the innate capacity or inherent quality of causing loss or injury to the consumers of goods and services<sup>224</sup>. On the point that even the innocent contests may be hit by this opinion, the commission argued:

The contest ceases to be innocent, if it is held for the purposes of promoting the sale for the business interest of the organiser of that contest<sup>225</sup>.

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223. Id at 388

224. Ibid.

225. Id at 389.

After this judgment in Colgate case, the MRTP commission took a consistent stand<sup>226</sup> in line with the Full Bench decision, that all enumerated practices are per se unfair. The shortcomings of this ruling were exposed by the findings of the commission in *re Dalmia Dairy Industries Ltd*<sup>227</sup> when it was held:

The D G has not produced any positive oral evidence to prove the loss and injury to the consumers, but there is no denial by the respondent of the impugned contest. It has already been held by the Full Bench of the commission vide order dated 19th June, 1991 in *society for civic Rights v. Colgate India Ltd*, that the words "and thereby causes loss or injury to the consumers" are words of description which indicate that the trade practice described in section 36 A of the Act are vehicles of loss or injury. Therefore, the contest for the purpose of promoting the sale is an unfair trade practice within the meaning of section 36 A (3) (b) of the MRTP Act 1969.

Authors<sup>228</sup>, while commenting on the judgment of the MRTP commission in Colgate case came with divergent opinions.

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226. For instance see in the matter of Dinners club India (p) ltd. Anr anv. (1992) 3 Comp. L J 54; *D G v . Indian photographic company ltd* (1992) 3 comp. L.J 181; In the matter of Dalmia Dairy Industries ltd (1992) 3. comp L J 304; In the matter of G T C Industries ltd Bombay (1993) 2 comp. LJ 109.

227. Ibid.

228. Rosy Kumar opines : All In all, the judgment of the full Bench has come as a rude shock which has the effect of perpetuating the wrong and the effect of putting a blanket ban on the promotional scheme while the legislature has never so contemplated. See Rosy Kumar Promotional Schemes Banned By The MRTP Commission; Law Permits But The Commission Does Not, Comp. L Digest, (1991) sept (xxi) at 17. On the other hand S. S H Azmi concludes: The decision of MRTP Commission in *society for civic Rights* is fair so far as it affirms that such practices are unfair per se. These practices have been declared void or illegal by industrialised and Civilised countries of the world because they are neither fair to business community nor are in public interest See *S. S H Azmi, A Critique On Society For Civic Rights v. Colgate Palmolive (India) ltd* 34 JILI (1992) 137.

It is submitted that the opinion of the commission needs rethinking for the following reasons.

The Sachar Committee<sup>229</sup> on whose recommendations, the chapter on unfair trade practices was incorporated did not suggest the key phrase "and thereby cause loss or injury" in the preamble of the Definition. Instead, following exceptions were suggested which were borrowed from section 37. 2 of the Combines Investigation Act of Canada.

- (a) there is adequate and fair disclosure of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the advertiser that effects materially the chance of winning.
- (b) distribution of prizes is not unduly delayed; and
- (c) selection of participants or distribution of prizes is made on the basis of skill or on random basis in any area to which prizes have been allocated.

These exceptions did not find favour with parliament when MRTP Act was amended in order to incorporate a chapter on unfair trade practices in the Act. Instead, key phrase "and thereby cause loss or injury to the consumer" was inserted so as to make it a criterion to determine the nature of all trade practices. Not only this alone, even if the key phrase is dismissed simply by saying that it is a legislative style or device of making it known why it regards a trade practice unfair, section 36 D of the MRTP Act enjoins the commission to pass any of the orders under

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229. The Report of the High Powered Expert Committee on Companies And MRTP Acts (popularly known as sachar committees Report) at 272.

that section only when it is of the opinion that the practice in question is "prejudicial to the public interest or to the interest of any consumer or consumers generally" This phrase is wider than "thereby causes loss or injury to the consumers" Thus section 36 D also requires the rule of reason and not per se approach.

With respect to restrictive trade practices enumerated in section 33 of the MRTP Act, the MRTP commission adopted per se approach which was over ruled by the supreme court in *TAA Engineering & locomotive Co ltd. v. R R T A*<sup>230</sup> and reaffirmed in *Mahindra & Mahindra ltd v. Union of India*<sup>231</sup>. In order to obviate the effect of the supreme court's rulings and to restore per se restrictive character of the trade practices, parliament amended MRTP Act in the same year in which a chapter on unfair trade practices was incorporated in the Act. Had legislature intended to adopt per se approach in case of the unfair trade practices also "the phrase thereby causes loss or injury to the consumer" would not have found place<sup>232</sup>.

The then Minister of Law, justice And Company Affairs Shri Jagan Nath Kaushal, while introducing MRTP (Amendment) Act, 1984 in the parliament made clear that the High powered expert

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230. A I R 1977 Sc 973.

231. A I R 1979 Sc 798.

232. Farooq Ahmad, Unfair trade Practices: An Appraisal Of The Legal Control 2 KULR (1995) at 96.

committee had even suggested that these practices should be straightaway declared as illegal and any person taking recourse to these practices should be prosecuted. Considering the fact that these are comparatively new provisions and proper administrative machinery has to be geared up to track down the violations throughout the length and breadth of this vast country, it is felt it would be enough if, at least for the time being, they are regulated by issuing of prohibitory orders and orders for payment of compensation for loss or damage suffered by the consumer and punishment by way of imprisonment enjoined upon only if those prohibitory orders are violated<sup>233</sup>.

It is submitted that the correct proposition of law is in the dissenting opinion of H C Gupta (Member) when he says that it is well nigh impossible to contemplate and conceive all type of situations which may fall under any of the enumerated categories. It is for this purpose that the legislature seems to have taken care to include the ingredient of the actual inherent harm to the consumers as an essential element of an unfair trade practice. It is indisputable that the consideration which would apply to a contest in the nature of lottery are necessarily different from those which will apply to a pure game of skill. Even though the latter is also organised for promoting directly or indirectly the sale, use or supply of any product without much element of chance

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233. Lok Sabh Debates, Vol. 48 (7.5.84) : 412.

or gambling instinct. Normally no business house or manufacturer/seller of a product would conduct even a game of skill without the intention of promoting at least indirectly, the sale or supply of his product. While the inherent loss or injury by eliminating or restricting competition to the consumer of the product is present in a case of lottery or game of chance, it cannot be said to be so in a pure game of skill. Therefore game of pure skill organised by the manufacturer of a product will not be per se unfair trade practice in terms of section 36 (A) unless on the facts of the case it is held that the loss or injury to the consumers is inherent in it<sup>234</sup>

To say that the contest ceases to be innocent if it is held for the purpose of promoting the sale or the business interest of the organizer of that contest is not, it is submitted, the correct proposition of the law. The objective of section 36 A is not to prevent promotion of sale, use or supply of goods by organizing contest but to prevent such contests which cause or have potential to cause loss or injury to the consumers or where loss outweighs the gain. Thus for example if tooth paste dealer through advertisement invites essays from the consumers of close-up and it is mentioned in the advertisement that the author of an <sup>a</sup>essay rated number one will be given one lakh. Is such contest prohibited under section 36-A? Is loss or injury inherent in such

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234. Supra note 220 at 391.

practice? It is submitted that the enumerated practices in section 36 A may be classified in to two general categories. The representations where plaintiff consumer has to establish only falsity. Such practices can conveniently be called as per se unfair. They do not require separate proof of loss or injury. Unthruth is inherently deceptive. But in addition to these, there are representations which require proof of actual or potential loss or injury to the consumer and mere fact that they resemble with the one enumerated in section 36 A will not be sufficient. Despite the Full Bench decision of the MRTP Commission in Colgate case and then a good number of the decisions toeing the same line, this controversy did not die down. In *M/s Arora contractors and Builders private ltd*<sup>235</sup>, the respondent an agent of the Ansal properties and Industries pvt. ltd. had announced prizes such as Maruti car, Vijay scooter and Refrigerator to be given to those persons who booked the plots through the respondent. Every person whosoever booked the plot was given a coupon enabling him to participate in the prizes which were drawn through random basis technique. Since the present case was heard by a Division Bench so it was not possible for them to overrule the decision of the Colgate case, handed down by the Full Bench. So without overruling Colgate case, the commission in the present judgment tried to distinguish it from the former case. It was observed:

We have carefully examined the above decision (of the Full Bench in Colgate case) and its implications. It must, however, be remembered that before a cease and desist order may be passed under

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235. (1994) C T J 64 (MRTP).

section 36 D (i), it has to be affirmatively proved that the impugned trade practice is prejudicial to the public interest of any consumer or consumers generally. This, in our opinion, is an independent requirement of Law. It is note worthy that while in regard to restrictive trade practices there is a presumption under section 38 of the MRTP Act that such a trade practice is prejudicial to public interest, there is no such corresponding presumption available in respect to the unfair trade practice. Further in Colgate Palmolive the Full Bench was concerned solely with the interpretation of section 36 A (1), more particularly the connotation of the words "and thereby, cause loss or injury". The implication of section 36 D (1) was neither considered nor even argued. That being so, conditions necessary for the application of section 36 D (1) must be present and satisfied before a cease and desist order be passed.

It needs mention here that the amendments were made in the MRTP and CP Acts in the year 1991 and 1993 respectively. The preamble of the unfair trade practice definition reads now:

In this part, unless context otherwise requires, unfair trade practice is a trade practice which for the purpose of the sale, use or supply of goods adopted any unfair method or unfair or deceptive practice including any of the following practices.

In the opinion of the MRTP commission expressed through *DG v. Cement corporation of Gujarat*<sup>236</sup> the only change brought by the amendments is that the Colgate case got statutory recognition that is, show of loss or injury to the consumer is now no more required. It is submitted that this is not correct. New definition is based on section 5 of the Federal Trade Commission Act, 1914 of America as amended by Wheeler Lea Amendment Act. The courts in United States while interpreting section 5 made it clear that to determine whether a trade practice is or is not

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236. (1992) 2 comp L J 323 at 327.



unfair one, loss or injury to consumer is a real test. However, courts made it clear that it is not necessary that consumer must have suffered actual loss but potential of a trade practice to cause loss to consumer is sufficient to declare such trade practice as unfair<sup>236a</sup>.

In America the accepted policy with respect to the gifts as a methods of pricing, merchandising and advertising is dictated by the following propositions. (1) There should not be any general prohibition of gifts. (2) The offeror should, however, be required to make full disclosure of the details of his offer, by fulfilling all terms and conditions of sale including premiums or free deals<sup>237</sup>. A New York court while commenting on a statute design to prevent price cutting in the sale of food stuff by prohibiting the giving of premiums or gifts in connection with the sale, said, " a person engaged as a retailer of coffee might very well think that he could greatly enlarge the amount of his trade by doing precisely what was done by the defendant in this case, and that, while his profits on the same amount of the coffee sold would be smaller than if he gave no present yet, by the growth of his trade his income at the end of the year would be more than by the old method<sup>238</sup>.

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236a. See for instance *FTC V. Hires Turner Glass co*, 81 F 2d 362 (1935) Cf. *FTC V. Blame*, 23 F.2d 615 n (1928) ; *FTC V. RF Keppel & Bro.* 29 US 304 (1934); *FTC V. Algoma lumber co*, 291 US 67 (1934).

237. Radolf Callmann, *The law of Unfair competition, Trade Marks and Monopolies* (3rd ed 1971) vol at 1045.

238. *People v. Gilson*, 109 NY 389 (1988).

Commenting on the approach of the Federal Trade Commission of America on the gift scheme as a sales promotion device, Rudolf Callmann observes:

In fact a genuine gift can be a legitimate method of advertising. It differs from other advertisements in the sense that the consumer is the beneficiary who really gets some thing for nothing. We concluded that a gift is lawful if it is a real gift, not given with an illegal intent to "injury a competitor out of business. Indeed, this would rarely be one purpose of a gift; one who offers a gift or premium is more interested in increasing his own business than injuring his competitor.

On the other hand in case of lotteries United States supreme court has in *Federal Trade Commission v. K. F. Keppel & Bros.*<sup>239</sup> through justice Holmes, held that the public policy requires the condemnation of devices which appeal to the gambling instinct, and induce people to buy what they do not want by a promise of gift or price, the nature of which is not known at the moment of making purchase<sup>240</sup>. However, courts have carefully distinguished between cases in which the customer has and those in which he has

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239. 291 US 304, 1934. for critical assessment see 32. Mich D Rev. 1142, in post Pub Co v. Murray, 230 F773 CCA 1st, 1916 a news paper advertised that its photographers would take pictures of 50 women shoppers. The faces would be blacked out in the publication, and any woman who could identify here picture would receive a \$5 gold pieces. This was not held an illegal advertisement but one that sought to catch the eye and increase the circulation of news paper.

240. Rudolf callmann opines that a lottery which induces prospective customers to view the display of its sponsor and which attracts attention to his product does immediate injury to his competitors. From a competitor point of view, therefore, consideration in a lottery is not only an insignificant element, but its absence even renders the game device much more effective in attracting attention.

not paid a consideration. The gratuitous distribution of property by lot or chance if no consideration is derived directly or indirectly from the party receiving the chance, does not constitute a lottery<sup>241</sup>.

In England as already pointed out that the Lotteries and Amusements Act, 1976 declares all lotteries as unlawful. Since there is no definition of the term "lottery", in the Act, the courts have made it clear that where a person is asked to "hit blind shots on the hidden target"<sup>242</sup> or to guess what would be the guess of others, such practices are lotteries. But any kind of skill or dexterity whether bodily or mental in which persons can compete would prevent a scheme from being a lottery if the result depended partly upon such skill or dexterity<sup>243</sup>. Section 14(b) of the lotteries and Amusement Act prohibits any competition in which success does not depend to a substantial degree on the exercise of skill. On the other hand where no payment or contribution is made by the participants, although the result depends upon the chance, yet such lottery is not prohibited<sup>244</sup>.

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241. *Affiliated Enterprises v. Gruber*, 86 F 2d 958 (CCA 1st, 1936) quoting from 17 RCL 1222.

242. *Coles v. Odhams Press Ltd.* (1935) All ER Rep 598 per lord Hewart CJ.

243. Supra note 195 and 196.

244. *White Bread and Co Ltd. v. Bell*, (1970)2 All ER 64.

In Canada there is general censure to offering of prizes or gifts or holding of the contest, lottery, game of a chance or skill but this is subject to some exceptions appended to section 3.7 of the Combines Investigation Act. These exception are the same as suggested by the Sachar Committee<sup>245</sup> but were not incorporated in MRTP Act.

Thus from the above discussion on transboder laws following points emerge.

1. Offering of gifts or prizes genuinely, are not prohibited.
2. Lotteries are against public policy and, therefore proscribed.
3. Lotteries which do not directly or indirectly demand public subscription are permitted.
4. Lotteries which run on the finance raised by the public subscription and which involve skill to a substantial degree are not in fact lotteries but game of skill, hence permitted.

It is suggested that the above tests should be applied by the MRTP Commission and consumer Redressal Agencies to determine the real nature of the advertisement. These tests naturally do not admit the per se approach but rule of reason.

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245. Supra note 292.

## GOODS INVOLVING RISK OF INJURY

The practice of marketing shoddy goods is rampant in India. The censure in such practice lies in the fact that the consumer is duped sometimes to the tune of his payment and he does not get even money's worth. The present day consumer is also exposed to risks by purchasing goods which endanger his life and property. Increasing affluence and range of complex consumer products combine to produce the all too prevalent situation in which unsafe products can produce death or serious injury. Sometimes the danger arises from defective design, at others, from the use of defective materials or poor workmanship. At other times hazards are created simply because inadequate instructions (or none at all) are given for the operation of complex appliances<sup>246</sup>. So the fleecing of consumer by taking his money in lieu of the sub-standard product is a lesser evil. The greater evil which needs immediate attention is to prevent the market from being flooded by the goods which involve risk of injury as these goods are double edged. They claim not only money but life or property as well. The MRTP<sup>247</sup> and CP Acts<sup>248</sup> have a provision to deal with such goods. This provision runs as under:

Permits the sale or supply of goods intended to be used, or are of kind likely to be used by consumers, knowing, or having reasons to believe that the goods do not comply with the standards prescribed

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246. Supra note at 718.

247. Section 36 A(4).

248. Section 2 (r)(4).

by competent authority relating to performance, compositions, contents, design, construction finishing or packaging as are necessary to prevent or reduce the risk of injury to the persons using the goods.

This provision is ambiguously worded. it is not made clear as to who is answerable to the consumer in case he is injured by using those goods. The words "permits the sale or supply of goods", if construed narrowly make the seller responsible to the consumer but the words "knowing or having reason to believe" absolves him from any responsibility in cases where goods have been supplied by the manufacturer which do not call for any examination or which are sold in the same package in which manufacturer had supplied<sup>249</sup>. As elaborated by Clerk J in a Scottish case of *Gordon v. M Hardy*<sup>250</sup> wherein the plaintiff's son died due to eating tinned salmon : the grocer could not be held liable for the defects in the goods because he was not expected to examine the contents of the tin without destroying the very condition which the manufacturer had imposed, in order to preserve the contents "the tin not being intended to be opened until immediately before use".

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249. S. S. H. Azmi opines : The modern mode of packaging of the goods is so complicated that the manufacturer intends and insists that the goods be opened only at the time of consumption and the packaging should not be disturbed unless the goods are required for actual use. This is done partly to avoid adulteration of the standard products and partly due to the reasons that certain packages are airtight. In otherwords, the possibility of intermediate examination is excluded. Sale of Goods And Consumer Protection in India (1st ed. 1992) at 77.

250. 1903 6f (Cf. of cess), 210.

On the other hand it may be argued that it is the manufacturer who basically permitted sale or supply of the goods and therefore, it is he who should bear the brunt. In his defence it may be put that since he was not a party to the deal with consumer so his liability does not arise.

It needs mention here that at the global level there has been a shift in the legal policy and now manufacturer is considered the right person to foot the bill. He is in a position to distribute the loss equitably and to cover the risk through insurance. As laid down in *Henning Sen v. Bloom field Motors Inc*<sup>251</sup>;

The burden of losses consequent upon use of defective article is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur.

Need to hold manufacturer liable is well highlighted by the Law Reform Commission of New South Wales<sup>252</sup> that it has come to be recognised that in the modern world where brand images and sales promotion by gimmickry or direct advertising on a nation wide scale are an accepted feature of every day life. It is the manufacturer who plays the vital role in persuading the consumer

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251. 32 NJ 358.161 A 2d 69; In *Escola v. Cola Bottling Co.* 24 Cal. 2d 453. Traynor J says that the manufacturer is in the best position to distribute the loss equitably arising due to preparation of faulty product. He can take out risk insurance and include it in the cost.

252. Working paper on the Sale of Goods (1975), para 63. Cf. John Goldring and Mark Richardson; liability Of Manufacturers For Defective Goods ALJ Vol5, March 1977 at 127.

to purchase his product. Many consumer goods are today sold in sealed containers which defy inspection or if available for examination, are so complex and of such intricate design that an inspection would convey nothing about their quality to the average purchaser ... the consumer is therefore driven to rely on the advice of traders and the accuracy of advertisement extolling the product he seeks. He relies more and more heavily on the manufacturer (on the brand name promoted by extensive advertising) and yet the sale is not normally made through him, but through some retail firm. The manufacturer can make what extravagant claims he likes for his product but he will be under no contractual liability to the purchaser for these promises, unless he can be brought within the *Carlil v. carbolic Smoke Ball Co.* principle<sup>253</sup>.

In England, the Consumer Protection Act, 1987, replacing the Consumer Safety Act, 1978 has incorporated a wide definition of "producer" which gives the injured consumer a visible and accessible target<sup>254</sup>. This definition runs as follows:

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253.' In the same vein Ontario Law Commission observed. In modern marketing millieu, the manufacturer is responsible for putting his product in the stream of commerce in most cases for creating demand for them by continuous advertising. The retailer is a little more than a way station. He determines the material and components and controls the quality of the goods. He determines the guarantee for his customers and is responsible for the spare parts and service facilities. Almost all the consumer's knowledge about the goods is delivered from the labels or markings attached to the goods or sales. Literature that accompanies them -- and these two originate from the manufacturer. report of Consumer Warranties and Guarantees In the sale of Goods, Toronto, June 1972 Chapter V. Para 19.

254. See comment on the Consumer Protection Act, 1987, New L.J. 2 october, 1987 at 930.



Producer of a product means:

- a. the person who manufactured it;
- b. in case of a substance which has not been manufactured but has been won or abstracted; the person who won or abstracted it;
- c. In case of a product which has not been manufactured, won or attributable to an industrial or other process having been carried out (for example in relation to agricultural) the person who carried out that process.<sup>255</sup>

Although the definition of producer is not free from ambiguities, yet it has made manufacturer directly liable. Another salient feature of the Act is the incorporation of strict rather than fault based liability in respect of the loss caused by defective products. Existing tort and contract remedies remain available, but are now supplemented by a new conceptual structure which focuses primarily on the condition of a product rather than the conduct of a producer<sup>256</sup>.

In India the tortious liability, like that of section 402 of American (Second) Restatement of Tort, 1965 is based on strict liability. This rule was followed in a different context in *M C Mehta v. Union of India*<sup>257</sup>, but the MRTP and CP Acts have not

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255. Section 1(2).

256. Alistair Clark; Legislation, The Consumer Protection Act, 1987 Vol. 50 MLR 614.

257. The Supreme Court held: We are of the view that an enterprise which is engaged in the hazardous or inherently dangerous industry which has a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non delegable duty to community to ensure that no harm results to any one on account of hazardous or inherently dangerous nature of activity which it has undertaken A.I.R (1987) Sc. 1086.

gone further. The compensation to consumer under these enactments can be awarded only when the opposite Party is found negligent.

The liability of the respondent arises only when his goods do not correspond with the standards prescribed by the competent authority and such goods involve risk of injury. The MRTP Act does not provide the constitution of any competent authority nor declares any authority competent for such purpose. The CP Act on the other hand gives Power<sup>258</sup> to the district forum inter alia to remove the defect<sup>259</sup> pointed out by the "appropriate laboratory" from the goods in question. The term appropriate laboratory<sup>260</sup> has been defined in the Act itself and a list of appropriate laboratories has been circulated by the Government of India<sup>261</sup>; However, neither in the MRTP Act nor in CP Act is prescribed any standard which the regulatory agencies have to follow. The bureau of Indian standards Act, 1986 gives power to the bureau to grant, renew, suspend or cancel licence for the use of the standard Mark<sup>262</sup>. The issue of licence or its

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258. Section 14.

259. The word defect has been defined in section 2(f) of the CP Act as any fault, imperfection or short comings in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or as is claimed by the trader in any manner whatsoever in relation to any goods.

260. The appropriate laboratory means a laboratory or organisation recognised by the Central Government and includes any such laboratory or organisation established by or under any law for the time being in force which is maintained, financed or aided by the Central Government or a State Government for carrying out analysis or test of any goods with a view to determine whether such goods suffer from any defect.

261. Vide circular letter No. D. O.No. 10/39/87-CPU, dated 1st. June, 1988.

262. Section 10.

renewal depends upon as to whether the manufacturer complies with the bureau of Indian Standards Certification Mark. However non compliance does not stamp the goods as perse hazardous nor is it compulsory that all the goods shall conform to the requirement of certification Mark<sup>263</sup>.

In Australia the trade practices (Amendment) Act (No.2) 1977 through section 63 A A empowers the Minister for Business and Consumer Affairs to publish through notice in the Common wealth Gazette that in respect of goods of a kind specified in the notice, a particular standard prepared or approved by the standards Association of Australia is a consumer product standard for the purposes of sections 62 and 63. These standards have been classified in to safety standard and information standard. Section 62 (2) which is partly based on United States Consumer Products Safety Act, 1972, provides that the safety standards must relate to

- a) performance, composition, contents, design, construction, finish or packing of the goods; and
- b) the form and content of markings, warnings or instructions to accompany the goods.

Which are reasonably necessary to prevent or reduce risk of injury to persons issuing the goods or to any other person.

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263. The provisions of section 11 of the Bureau of Indian Standards Act, 1986 prohibits use in relation to any article or process, or in the title of any patent or in any trade mark of design, the standard mark or any colourable limitation except under a licence. The licence is necessary only for those manufacturers who wish to use standard mark.

Section 63(2) provides that the regulation may in respect of goods of a particular kind, prescribe a consumer product information standard consisting of such requirements as to --

- a) the disclosure of information relating to the performance, composition, contents, design, construction finish or packaging of the goods; and
- b) the form and manner in which that information is to be disclosed on or with the goods,

as are reasonably necessary to give person using the goods accurate information as to the quality, quantity, nature or value of the goods.

The contravention of these regulations subject to the exceptions is punishable on conviction by a fine not exceeding \$ 1000 and in case of defendant who is a body corporate, by a fine not exceeding \$50, 000.

It is suggested that in order to minimize the danger which the hazardous goods are likely to pose, an independent body be constituted with the powers to prescribe standards on the same lines as are prescribed in Australia. The MRTP Commission and Redressal Agencies be given power to enforce such standards and violation if any, be checked by imposing fine.

Since the "risk of injury" is the core test under the present provision to prohibit a trade practice, it is not clear as to whether it is confined to only physical injury or injury of any sort. The MRTP commission expressed conflicting opinions on this

point. In public *Interest issues research Academy v. KMP oil Industries pvt. Ltd*<sup>264</sup>. the respondent engaged in the business of marketing coconut oil, packed it in volumetric measures in terms of liters and mililiters, contrary to the Standards of Weights and Measures (packaged commodities) Rules, 1977 where under it had to be packed by weight interms of grams and kilograms and therefore, caused wrongful loss to the consumer to the tune of 10 per cent quantity of oil. The commission held that it violated clause (4) of section 36 A of the Act.

On the other hand *In re food specialities ltd.*<sup>265</sup>, the commission held that if non compliance with the standards prescribed causes only financial loss and does not involve the risk of physical injury, it does not amount to an unfair trade practice within the meaning of section 36 A (4) of the MRTP Act, 1969. The sale of a package containing contents less than what is mentioned on the container may amount to contravention of the Standard of Weights and Measures ~~(packaged commodities) Act~~ or rules thereunder, but the implementation of the said Act or rules is not within the jurisdiction of the commission unless there is an unfair trade practice within the meaning of section 36 A of the MRTP Act.

It is submitted that it is the former and not the latter opinion of the commission which is the correct interpretation of

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264. UTPE No.40 1986 order dated 17.12.1987.

265. (1991) 70 Comp. Cas. 565.

the provision. The Bombay High court in *Abdul Kadar v. Kashi-nath*<sup>266</sup> held that the word "injury" is a word of large import and cannot be restricted to mean monetary injury only any wrong or damage done to another, either in his person, right, reputation or property. The supreme court in a recent ruling of *Consumer Unity and Trust Society v. the CMD Bank of Baroda and Anr*<sup>267</sup> held: loss is a generic term. It signifies some detriment or deprivation or damage. Injury too means any damage or wrong<sup>268</sup>. Thus the word injury cannot be confined to physical injury only but includes monetary loss as well<sup>269</sup>.

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266. AIR 1968 Bom. 267 at 270.

267. (1995) 3 CTJ 97 (Supreme Court) CP

268. Id. at 99.

269. Section 44 of the Indian Penal Code defines injury as any harm whatever illegally caused to any person, in body, mind reputation or property.

# ***Chapter VI***

## **POWERS OF THE MRTP COMMISSION VIS-A-VIS UNFAIR TRADE PRACTICES**

## POWER TO GRANT INJUNCTION

Injunctive relief is a product of equity courts and the object is "to lock the stable door before the horse is stolen"<sup>1</sup>. The injunction as a preventive remedy is invoked where either a wrong is being done or there is a reasonable likelihood that an injurious act already begun will continue. Although all the legislations aiming to protect consumer interest have the provision for injunction<sup>2</sup>, this relief was not available under original MRTP Act, 1969. Interestingly the provision dealing with the grant of injunction was incorporated in the year 1984 in which the chapter on unfair trade practice was introduced, on the recommendations of the Sachar Committee. The Committee observed<sup>3</sup> that it is possible that the commission may in some cases be of the opinion that prime facie the trade practice in question should not continue, but commission cannot stop such practices as it has no power to pass interim injunction which is a serious

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1. *United Drug Co v. Parodney*, 24 F 2d 577 (DCE)
  2. For instance, section 80 of the Trade Practices Act, 1974 of Australia, section 16 of the Clayton Act, 1914 of USA and section 3 of the Restrictive Trade Practice Act, 1976 of England.
  3. It was said: There is no power at present with the commission to pass any order of interim injunction. It may happen that a matter is brought before the commission and prima facie the commission is of the view that such practice should not be allowed to continue during the pendency of inquiry. But at present there is no power to issue any interim injunction. This is a serious lacuna. We would therefore, recommend that the commission should have the power, on the application of the Director General of trade practices, the Central Govt. State Govt., or any other aggrieved person, to grant an interim injunction restraining any person from engaging in or continuing with any of the prohibited practices... Report of the High Powered Expert Committee on Companies and MRTP Act (Popularly known as Sachar Committee) 1978 at 274.



lacuna in the Act. On the recommendations of the Sachar Committee, section 12(A) was carved out to provide provision for injunction<sup>4</sup>. Ever since the incorporation of provision dealing with the injunction, the MRTP Commission has received a plethora of applications for the grant of injunctive relief as is revealed by the following table.

**TABLE : I**

**Statement showing year-wise institution, disposal and pending number of injunction applications U/s 12A of the MRTP Act.**

Year	Applications pending at the beginning of the year	Applications received during the year	Applications disposed of during the year	Applications pending at the end of year
1985	Nil	25	18	7
1986	7	71	33	45
1987	45	116	97	64
1988	64	162	136	90
1989	90	66	78	78
1990	78	81	63	96
1991	96	58	78	76
1992	76	81	70	97
1993	97	149	63	183

**SOURCE :** *The 15th-23rd Annual Report Pertaining to the Execution of the provisions of the Monopolies and Restrictive Trade Practice's Act, 1969 for the period from 1st Jan., 1985 to 31st December, 1993. After 1993 till date no Report has been Published.*

4. Section 12. A(i) reads as: where, during an inquiry before the commission it is proved whether by the complainant, Director General, any trader or class of traders or any other person, by affidavit or otherwise, that any undertaking or any person is carrying on or is about to carry on any monopolistic or any restrictive or unfair trade practice and such trade practice is likely to affect prejudicially the public interest or the interest of any trader, class of traders or traders generally or of any consumer or consumers generally, the commission may for the purposes of staying or preventing the undertaking or as the case may be, such person from causing such prejudicial effect, by order, grant a temporary injunction restraining such undertaking or person from carrying on any monopolistic or restrictive or unfair, trade practices until the conclusion of such inquiry or until further orders.

(2) The provisions of rules 2A to 5 (both inclusive of order xxix of the First Schedule) of the Code Of Procedure, 1908 (5 of 1908) shall as far as may be, apply to a temporary injunction, issued by the commission under this section, as they apply to a temporary injunction issued by a civil court, and any reference to any such rule to a suit shall be construed as a reference to an inquiry before the commission.

The remedy of injunctive relief can be provided only when the following conditions are satisfied:

1. that there is an inquiry before the MRTP commission.
2. during that inquiry it is proved whether by the complainant, Director General, any trader or class of traders or any other person, by affidavit or otherwise, that any undertaking or any person is carrying on or about to carry on any monopolistic or restrictive or unfair trade practice.
3. that such a trade practice is likely to affect prejudicially the public interest or the interest of any trader, class of traders or any consumer or consumers generally.

The controversy rolled round the fact that what is meant by "during an inquiry before the commission"? Conflicting opinions were expressed on this point. The Gujarat High Court in *Wim Co Ltd. v. Liberty Match Co and Ors*<sup>5</sup> observed that section 12(A) envisages the making of an application for an injunction during an inquiry before the commission. In other words, the inquiry must be pending before such an application can be submitted. These words postulate that before an interlocutory injunction can be granted by the commission, the Pre-requisite is pending inquiry. The inquiry itself must arise independent of the prayer for an interlocutory injunction<sup>6</sup>.

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5. (1991) 70 Comp cas. 620.

6. Id at 632.

Following its earlier decision in *Eagle Flask Pvt. Ltd. v. Union of India*<sup>7</sup>, the Division Bench of Bombay High court in *Milton Plastic v. Union of India*<sup>8</sup>, came in agreement with the Gujarat High court by invoking Regulation 50 of the MRTPC Regulations, 1991. In the opinion of the court the said Regulation<sup>9</sup> makes it clear that when the commission is of the opinion that there are sufficient grounds to issue a process, such process shall be issued and it will be called notice of inquiry. Thus the inquiry before the Commission begins with the issue of notice of inquiry.

Another Division Bench of the Bombay High court in *M P Ramachandran v. Union of India*<sup>10</sup>, without expressly rejecting the opinion expressed in *Milton plastic* (Supra), tried to interpret its ratio in such a way as to serve its own purpose. The court laid down that the Division Bench in *Milton plastic* did not say that the enquiry will commence only after the service of the notice of inquiry. There are many situations where the term "issue" would envisage not merely passing of the order and keeping it in the drawer but actual communication of the service to the parties concerned. Nevertheless, this principle is

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7. Write petition No. 3516 of 1987 Now. 18, 1987.

8. (1992) 2 Bom. LR; (1994) 4 Comp. L J 112.

9. Regulation 50 runs as follows: If on receipt of a Complaint, reference or application or information under clause (a) of section 10 of the Act and on consideration of any evidence or record or a preliminary investigation report, if any, the commission is of the opinion that there are sufficient grounds to issue a process, such a process shall be issued and it will be called notice of inquiry.

10. (1993) 77 Comp. Cas 54.

not attracted in the present case. What is material, is a decision of the Commission about the prima facie satisfaction of the existence of grounds for entertainment of the complaint. It will not be in the interest of the consumers to hold that the Commission is duty bound to issue a notice of inquiry before passing an injunction order<sup>11</sup>.

It is submitted that the opinions of Gujarat and Bombay (in Milton Plastic's Case) High Courts are open to question for the follow reasons:

- a. The very purpose of providing a provision for injunction is to prevent imminence of a wrong or the continuance of the wrong already perpetrated. As Wilbi-force in *Hoffmann La Roche (f) & Co. v. Secretary of State for Trade Industry*<sup>12</sup> puts it, "the object of an interlocutory injunction is to prevent a litigant, who must necessarily suffer the law's delay, from losing by that delay, the fruit of his litigation. This objective will be frustrated by the rulings of the Bombay and Gujarat High Courts
  - b. A false or misleading advertisement generally remains current for a limited period. The period during which this advertisement will remain in force, will be consumed first by lodging a complaint and then filing a separate application for temporary injunction as envisaged in the above said opinions and when the turn of issuing an injunction will come, the trader may discontinue the practice and thus will make injunction futile.
  - c. The Bombay High Court misinterpreted Regulation 50. The said Regulation in so many words makes it clear that the notice of enquiry shall be issued where the commission required the attendance of the person or persons complained. It never says that the inquiry
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11. Id at 61; MRTP Commission in *voice and IFCO v. ITC Ltd* also came in agreement with the Bombay High courts opinion in M P Ramachandrans (1995) 1 Comp.L J 235

12. (1975) AC 295, 355 (House of Lords).

before the commission begins with the issuing of a notice of inquiry as articulated in the opinion. Instead of Regulation 50, it is Regulation 17 which is applicable. It may be noted that under Regulation 17 of the MRTTP Regulations, 1991 the commission may, on receipt of a complaint, reference, application or information, or as the case may be, on its own knowledge under section 36B, order a preliminary investigation by the Director General and Regulation 17(2) provides that the order of investigation by the commission under sub-regulation shall be deemed to be the commencement of inquiry under the Act.

Thus the proper interpretation of section 12-A on this matter would be, that the sooner the commission issues a notice of inquiry, either suo motu or on the application of any person, the inquiry is deemed to have started. It would not be wrong to stretch this theory a little more by stating that when a complaint is filed, the commission is seized of the matter, the inquiry starts<sup>13</sup>.

The above view may appear, impinging the principles of natural justice<sup>14</sup> by not giving respondent an opportunity to put his view point as lord Up John in *Durayappah v. Fernando*<sup>15</sup> opines:

While great urgency may rightly limit such opportunity, there can never be a denial of that opportunity, if the principles of natural justice are applicable<sup>16</sup>.

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13. Venkata; Injunctions Under The MRTTP Act: Some Aspects 1985 1 Comp LJ 30 at 31.
14. R Santhanam in his article "Injunction Orders By MRTTP Commission," (1986) 3 Comp LJ 91 opines that hearing should be given to the respondent before passing an ad interim injunction.
15. (1967) 2 AC AC 337.
16. Id at 346 see also *swadeshi cotton Mills v. Union of India* (1981) 51 Comp cas 210.

Further, the Supreme Court has frowned any attempt to take away any fundamental right to carry on business and has made it imperative for the authority concerned to give a proper, fair, judicious and adequate opportunity of being heard to the person before depriving him of the right to carry on business<sup>17</sup>.

However, the Supreme Court did not find it advisable to place principles of natural justice in the strait jackets, instead opined in *Nagendra Nath Bora and Anr v. Commissioner of hills Division*<sup>18</sup>, that the rules of natural justice vary with the varying constitutions of statutory bodies, and the rules prescribed by the Act under which they function and the question whether or not any rule of natural justice had been contravened, should be decided not under any pre-conceived notions, but in the light of the statutory rules and provisions.

Not only this alone, section 12A(2) clearly states that rules 2A to 5 (both inclusive) of Order xxxix of the First Schedule to the Code of Civil Procedure, 1908 shall as far as may be, apply to a temporary injunction, issued by the commission under this section. Rule 3 of Order xxxix, Civil Procedure Code gives discretion to the MRTP commission to pass an ex parte ad interim injunction where delay in issuing the same will defeat the very

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17. See *State of Punjab v. Gurdial Sing* AIR SC 319 see also *Dora Phalanli v. State of Punjab and Ors* AIR 1979 SC 1594; *Narain Govind Garate v. State of Maharashtra Ors* AIR 1977 SC 183, *Keshav Mills Corporation v. Union of India* (1973) 3SGR22.

18. AIR 1958 SC 398.

purpose. Thus the MRTP commission took a rightful stand in *DG v. Shantha Kumari*<sup>19</sup>, when it was laid down that in view of rule 3 of Order xxxix of the Code of Civil Procedure read with section 12(2) of the MRTP Act, a notice should be given to the respondent before issuing a temporary injunction unless the delay will defeat the very purpose of injunction<sup>20</sup>.

Another point which goes in favour of the approach adopted by the MRTP commission is non application of sub section (3) of section 148-A of the Civil Procedure code to section 12(A) of the MRTP Act. This runs as follows:

Where, after a caveat has been lodged under sub section (1) any application is filed in any suit or proceeding, the court shall serve a notice of the application on the caveator.

It was aptly made clear by the MRTP commission in *DG v. Universal Luggage MF Co*<sup>21</sup>, that the provisions of the Civil Procedure Code have been applied only to some extent by section 12(1) of the MRTP Act. Section 148-A is not included in those provisions. However, the Commission applied the provisions of Civil Procedure Code, vide Regulation 15(2) (Now 13(2) MRTP Regulation, 1991) of the MRTPC Regulation 1974. In regulation 15(2), it has been clearly stated that the provisions of Civil Procedure Code will apply only where there is no specific provision in these regulations. That means, the Civil Procedure Code

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19.(1987) 62 Comp. Cas 157.

20.Id at 158.

21.(1987) 62 Comp Cas 275.

cannot override the regulations and that being so, obviously, it cannot over-ride the parent statute i.e. the MRTP Act under which the regulations have been framed.

Furthermore, the MRTP Commission has taken a pragmatic stand by insisting that since the relief of temporary injunction owes its origin to equity; the well established principle of equity is that he who seeks equity must do equity and therefore complainant should come with clean hands<sup>22</sup>. The applicant must be able to prove not only that he has a prima facie case, and that balance of convenience has in his favour, but also that irreparable injury would be caused to him if it is not granted<sup>23</sup>. The MRTP Commission rejected the opinion expressed by the majority of High courts that the existence of a prima facie case is sine qua non for considering the grant of temporary injunction<sup>24</sup> and held that it itself is not sufficient and temporary injunction cannot be granted unless and until the balance of convenience is in his favour and there is likelihood of irreparable loss or injury. The right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence and then decide what is best to be done. Sometimes it is best to grant injunction so as to maintain the

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22. *Consumer Durable Dealers Asso. v. Godrej Boyce* (1989) 2 Comp LJ 292.

23. Id at 291.

24. In fact it is the opinion of Rajasthan High court expressed in *Shayak Mohd & Ors v. Iqbal Ahmad* AIR 1973 at 115 which was adopted by the MRTP commission.



status quo until the case is over. At other times, it is best not to impose restraint upon the respondent but leave him free to go ahead. The best approach would be to exercise broad discretion having regard to the entirety of the facts of the case. The remedy of the interlocutory injunction is to be kept flexible and discretionary rather than being the subject of strict rules<sup>25</sup>.

In America, section 408 of the Trans Alaska Oil Pipeline Act, empowered for the first time the Federal Trade Commission to seek temporary or permanent injunction from the court. The standard of proof to be met by the commission for the issuance of a temporary restraining order or a preliminary injunction is not the same as is imposed by the traditional equity standard which the common law applies to private litigants. The Conference Report states:

The intent [of section 408 (f)] is to maintain the statutory or public interest standard which is now applicable and not to impose the traditional equity standard of irreparable damage, the probability of success on the merits, and that the balance of equities favours the petitioner. This latter standard is derived from common law and is appropriate for litigation between private parties. It is not, however, appropriate for the implementation of a Federal Statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief<sup>26</sup>.

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25. See *RC Yadav v. ITC limited* (1991) 1 Comp. LJ 119; *DG v. Cement Manufacturer Association* (1991) 1 comp. LJ 291.

26. H.R. Rep No 93 624 Cong. Ist Sees. 31 (1973).

In case of unfair trade practices, it is not sufficient to see whether balance of convenience is in favour of plaintiff but to measure balance of convenience and irreparable loss vis-a-vis general public.

**Conflict Between section 36 C and 12 A Removed:**

Under section 36 B(a), the MRTP Commission may inquiry into any unfair trade practice upon receiving a complaint of facts which constitutes such practice <sup>Inter alia</sup> from any trade association or Consumer. Section 36 (C) before amendment<sup>27</sup> provided that on receipt of a complaint under section 36B(A), the Commission shall cause a preliminary investigation to be made by DG (I&R) before issuing any process requiring the attendance of the person complained against.

Thus any application seeking temporary injunction could have been easily thwarted by raising defence that mandatory requirement of causing a preliminary investigation has not been gone through. The grant of injunction did not augur well with the requirement under section 36(C) as also it was not possible to read word "shall" as "may" as the legislature had consciously employed this expression. In fact, the word "shall" in section

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27. Before amendment in 1991, section 36 (c) was as follows: In respect of any unfair trade practice of which complaint is made by an association under clause (a) of section 36B, the commission shall before issuing any process require the attendance of the person complained against, cause a preliminary <sup>investigation to</sup> be made by the DG in such a manner as it may direct, for the purpose of satisfying itself that the complaint requires to be enquired into.

11(1) which is in pari materia with section 36(C), was substituted by the word "may" by the amendment Act, 1984. This anomaly has been removed by amending section 36(C). The amended provision runs as under;

The Commission may, before issuing any process requiring the attendance of the person against whom an inquiry (other than an inquiry upon an application by the Director General) may be made under section 36 B, by an order requiring the Director General to make, or cause to be made, a preliminary investigation in such a manner as it may direct and submit a report to the Commission, for the purpose of satisfying itself that the matter requires to be inquired into.

The amendment made in section 36(C) fortifies the opinion expressed by the Commission in *VOICE* and Indian Federation of Consumer organisation *IFCO v. ITC Ltd.* (Supra).

However, the above discussion is merely of an academic interest as the MRTTP (Amendment) Act, 1991 has set the controversy at rest by incorporating following two explanations to section 12A

**Explanation I:**

For the purposes of this section an inquiry shall be deemed to have commenced upon the receipt by the commission of any complaint, reference or, as the case may be, application or upon its own knowledge or information reduced to writing by the commission.

**Explanation II:**

For the removal of doubts, it is hereby declared that the power of the commission with respect to temporary injunction includes power to grant a temporary injunction without giving notice to the opposite party.

**Locus Standi For The Grant of Temporary Injunction:**

Section 12 A clothes, any trader, class of traders or "any other person" with the power to file an application for the grant of temporary injunction. It is interesting to note that neither

section 10(a) nor section 36 B provides that any trader or class of traders can file a complaint. The question is, when they are not entitled to file a complaint, how the requirement that "during the inquiry" be satisfied and trader's injunction application will be allowed.

A superficial reading of section 12 A shows that it is a drafting mistake. However, there is a ruling of the MRTP commission expressed in an agreement relating to Nylon Filament Yarn<sup>28</sup>, Upheld by the Delhi<sup>29</sup>, Allahabad<sup>30</sup>. and Calcutta<sup>31</sup> High courts that the commission can exercise suo motu power under section 10(a) or 36 B(a) and source of information can be even invalid or irregular complaint or even an anonymous letter. Thus the commission on receiving complaint from a trader or a class of trader, can treat it as an information for instituting suo motu inquiry. Once it is done, the trader or class of traders can then apply for the grant of temporary injunction.

**Application of Civil Procedure Code 1908:**

No provision under the MRTP Act provides punishment for the violation of an injunction order. However, sub clause (2) of section 12-A makes provisions of rules 2 A to 5 (both inclusive)

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28. (1975) 47 Comp. Cas 646.

29. *Nirlon Synthetic Fires and chemical Ltd. and anr v. R.D. Saxena, D.G. of Investigation & Ors* (1976) 46 Comp. cas. 419 see also *Ballaspur Industries Ltd. v.DG (I&R)*, (1988)3 Comp LJ 283.

30. *JK Synthetics Ltd v. R.D Saxena, Director of Investigation and Ors* (1977) 47 Comp. cas 323.

31. *ITC Ltd v.MRTP Commission and Ors* (1976) 46 Comp. cas 619.

of Order xxxix of the first schedule of civil procedure, applicable to a temporary injunction issued by the commission. The moot point is that can MRTTP commission exercise powers of civil court under Civil Procedure Code for breach of an injunction order? The answer seems in affirmative, as the very purpose of granting of injunction, will be frustrated if the commission is not given power to punish for violation. However, it appears that the suitable follow-up provisions to fully effectuate this power under sub section (2) of section 12-A have not been made and therefore in a given case how the commission would proceed to, say, commit a person to civil prison for infringement of the injunction order, remains ambiguous. Section 135 of the Code of Civil Procedure, 1908 read with sections 55, 57 and 59, suggest that the person to be arrested is to be brought to the court. Sub-section (2) of section 12-A does not expressly provide that any reference to court in Order xxxix rule (2-A to 5) shall be construed as reference to commission<sup>32</sup>.

An important question arises as to whether temporary injunction order can bring within its import, not only the actual perpetrator but those aiding, abetting or conspiring with the actual wrong doer. Section 12A is silent on this point instead, it expressly covers not only actual doer but also those who are about to carry on the proscribed practice. Section 80 of the

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32. S .M. Dugar, Law Relating to Restrictive and unfair Trade practices with consumer protection (1992 2nd ed.) at 107.

Trade Practices Act 1974 of Australia provides that the court may on application<sup>to</sup>

- a) The Minister,
- b) The Commissioner,
- c) Subject to sub section (IA) any other person, grant an injunction restraining a person from engaging in a conduct that constitutes or would constitute
  - a) a contravention of a provision of part IV or V
  - b) attempting to contravene such provision
  - c) aiding, abetting, counselling or procuring a person to contravene such provision.
  - d) Induc-ing or attempting to induce, a person whether by threats, promises or otherwise to contravene such provision.
  - e) being in any way directly or indirectly knowingly concerned in, or party to the contravention by person or any provision; or conspire with others to contravene such provision.

Thus the above provision is comprehensive enough to cover advertising agencies, mass media and all those who help directly or indirectly in the contravention of the provision. This type of relief is not possible under the present scheme of the MPTP Act. The Sachar Committee had in its report recommended a provision,<sup>33</sup>

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33. The suggestion of the Sachar Committee runs as follows: The Commission may

- i) on an application of the Director General of Trade practices or any other persons; or
- ii) on its own motion during the course of any inquiry into any monopolistic, restrictive or unfair trade practice under this Act, issue an injunction restraining a person or an undertaking from --
  - a) engaging in any conduct that constitutes or would constitute contravention of any of the provisions of sections (sections relating to monopolistic, restrictive and unfair trade practices);

like section 80 of the Australian Trade Practices Act 1974 but the same was not incorporated in the Act. It is suggested that the provision be incorporated in order to give more teeth to the injunctive relief.

In India temporary injunction can be granted by the MRTP commission. In USA section 16 of the Clayton Act provides for injunctive relief which can be granted not by the Federal Trade Commission but by any court of America having jurisdiction over the parties against the threatened loss or damage by violation of the anti trust laws<sup>34</sup>. In Australia also position is no different from America and only court can grant temporary injunction.

In India legislature quite rightly thought it advisable to arm the MRTP commission with the power to grant injunction, in view of the constitution of the MRTP commission and its

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- b) attempting to contravene any such provision;
  - c) aiding, abetting in the contravention of any such provision;
  - d) inducing or attempting to induce a person whether by threats, promises or otherwise, to contravene any such provision,
  - e) being in any way, directly or indirectly and knowingly concerned in, or party to the contravention by a person or any such provision; or
  - f) conspiring with others to contravene any such provision.
- (12) where, in the opinion of the commission, it is desirable to do so, the commission may grant an interim injunction pending determination of an application or inquiry under section (1).
- (3) the commission may rescind or vary an injunction granted under sub section (1) or subsection (2).

34. Callmann unfair competition, Trade Marks and Monopolies Vol.4 at 172.

experience as it deals exclusively with the business practices. However, section 55 of the MRTP Act, which deals with the appeal against the orders of the MRTP Commission, is silent on the appeal against the order of the MRTP Commission under section 12-A. Does it mean that the injunction order is not appealable? This is not possible as the aggrieved party can go to the High Court or Supreme Court under Articles 226 and 32 respectively. The object of granting an injunction can be frustrated by a stay of High court or Supreme Court. The labour and time taken by the commission would be in vain. The resort to High Courts by way of writ petitions against even interim order by the commission is not in any way new, as there are examples in galore where the respondents have filed writ petitions on many interim orders passed by the commission. Although commission can also go to the Supreme Court against the order of the High Court yet, that will not be in the interest of the consumers as the unscrupulous trader will always try to buy time. Therefore the present legal position is more favourable to the *Trader* than the *Consumer*. It's gratifying to mention here the word of advice of Bombay HC in *Ramchandran v. Union of India*<sup>35</sup>.

Once it is assumed that the commission had acted with jurisdiction, this court should not ordinarily entertain a writ petition under Art. 226 of the constitution of India against such an ad interim order. It will certainly be open to the writ petitioner to present its version before the commission and offer support and buttresses on which it designs its defence. The commission will certainly look into the entirety of materials uninhibited by the ad interim order.

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35. Supra note 9.



The above judicial restraint exhibited by the Bombay High Court is of course a positive step to allow MRTP Commission to function without interference. Nevertheless there is no guarantee that the other High Courts will also take like stand in future. Thus it is suggested that section 55 be amended by making order of injunction appealable before the Supreme Court with a clause stating that an interim injunction order passed by the MRTP Commission shall not be called in question in any High Court.

The grant of temporary injunction is the discretion of the courts so also of the commission as is evident from the bare reading of section 12-A. The commission has to exercise its discretion between the two polar extremes which are "not to damage the business of a defendant, nor unreasonably hesitate to give proper protection to consumer or consumers and trader or traders generally." The rule may be stated not without reservation however, that an interim injunction which in effect, pre-determines the ultimate outcome of the litigation and gives the same relief as that which is sought by the final judgment, should be granted with great caution, and only when necessity requires<sup>36</sup>. Where respondent cannot be duly notified and time is of the essence, the ex parte injunction may be granted. If the injury to the complainant is not aggravated by requiring him to

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36. *Writing Mfg. Co. v. Joseph H. Banland Co.* 56 NYS 114 (1898). *Leshner v. Flowers for you, Inc.*, 151 KYS 2d 8L (Sup Ct.1956), See also *Cotton Corporation of India Ltd. v. United Bank Ltd.* (1985) 55 Comp. Cas 423.

notify the respondent to appear and show cause why the relief sought should not be granted, there is no immediate and pressing need for an ex-parte proceeding<sup>37</sup>. The ex-parte injunction issued by a Gangtok Distric Court against ITC should be an eye opener for MRTP Commission. Here respondents, the manufacturers of cigarett<sup>e</sup>s under the Brand name of WD and H.O. Wills were using this brand for two decades. Even then the Court restrained respondents from selling cigarett<sup>e</sup>s under that name till the disposal of the case<sup>38</sup>. This ex-parte injunction caused a daily revenue loss of rupees five crores to the Government and more than rupees one crore to the company concerned<sup>39</sup>. The company had to seek the intervention of the Supreme Court of India for expeditious hearing of the case. Another ex-parte order passed by the commission itself in *DG (I&R) v. Cement Manufacturers Association and Ors*<sup>40</sup> reveals the lassitude on the part of the commission when even closed cement unites were charged of restrictive trade practices of collectively raising up the cement prices<sup>41</sup>. Thus

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37. New York Asbestos Mfg. Co. v. Ambler Asbestos AIR Cell Covering Co, 99F 85 (CCED Pa 1900); Advance Neckwear Co. v. Goidl, 77 SW 2d 598 (Tex Cir App. 1434).

38. Earlier the MRTP Commission had dismissed the injunction application against the respondent, RC Yadav v. ITC limited CLD Vol. (xx) 1991 at 65.

39. See S.S. Kumar, Ex parte injunction - May lead to Tragic Consequences CLD Vol. (xx) 1991 at 9.

40. UTPE No. 179/ 1989 IA No.65/ 1989 decided on 10.9.90.

41 The Economic Times 19 Sept, 1990.

the word of caution sounded by the Supreme court in a recent ruling in *Union Territory of Pondichary v. P. V. Suresh*,<sup>42</sup> which applies with full force to the MRTTP Commission, deserves mention here:

Passing of interim order is not and cannot be a matter of course -- nor a matter of charity. In matters touching public revenue the courts ought to be more cautious. For better or worse, the courts have come to acquire a veto over the public exchequer. This power should be exercised with good amount of self restraint and with a sense of responsibility. The power is coupled with accountability -- accountability to the Constitution, to the laws of the land and above all to ourselves. The court must apply its mind to the facts of the case and must also envisage the implications and consequences of the order it proposes to make. This is so even at the ad interim stage when the respondent is not represented.

#### **POWER TO GRANT COMPENSATION**

To the fourteenth century Judges success of any action depended on the maxim ubi remedium ibi jus (where there is a remedy there is a right). However, nineteenth century witnessed metamorphosis of this principle resulting in birth of the maxim ubi jus ubi remedium (where there is a right there is a remedy)<sup>43</sup>. Thus it became a well established principle of Jurisprudence that for every wrong there must be a remedy. This was reflected in all the antitrust legislations throughout the globe. The relief is provided by way of compensation to any consumer if

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42.(1994)I Comp. LJ 120; Similar echo is found in the opinion expressed by Gauhati High court in Smt. Apariajit Mukerjee and Ors v. Anil Kumar Mukherjee and ors, AIR (1990) Gau 73.

43.These days the form of remedy is hardly an appropriate way to define substantive rights and liabilities. Wright, Introduction to the law of Torts (1944) 8 CLJ 238.

loss or injury is caused by the unfair method of competition employed by any trader.<sup>44</sup>.

The original MRTP Act did not contain any provision for the award of compensation prior to 1984. The Sachar Committee<sup>45</sup> observed that the prohibited practice can cause loss or damage to the consumer but there is no provision to provide compensation to the injured party. At present, MRTP Commission can pass only

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44. For instance, In USA Sec 7 of the Sherman Act and Sec 4 of Clayton Act, provide that any person who has been injured in his business or property by reason of any thing forbidden or declared to be unlawful may sue with respect to the amount in controversy and recover three-fold the damages sustained and the costs. Similarly sec 6 of the Federal Act (Switzerland); Sec 6 of the Act against Restraint of Competition (Spain); Sec 25 of the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade Act Japan; Sec 82 of the Trade Practices Act, 1974 (Australia) as amended in 1977 and the Combines Investigation Act of Canada as amended by Competition Bill, 1977 by Sec 31.1 provide provision to recover damages from the person who has indulged in trade practices which are prohibited.

45. It was observed : It is apparent that the prohibited practices, if indulged in, are likely to cause grave loss or damage to many consumers. But in the Act there is no provision for awarding damages to a person, a body or even the state and the Central Government against those who have indulged in any of the practices which are prohibited. This is a highly unsatisfactory state of affairs. A consumer may be compelled to pay higher prices as a result of monopolistic, restrictive or unfair trade practices. And yet as the Act at present stands, the only order which he may obtain is of cease and desist. Such an order can at best be a preventive one for future. It can obviously not compensate the injured party for the losses already suffered. Thus, unless a provision is made for damages, a party who suffer from the prohibited practice being indulged in by producer or seller or supplier will hardly receive the benefit which the Act is supposed to confer on an average consumer. The injury to the business or property caused as a result of prohibited practice calls for remedy... We therefore feel that a similar provision as in Australian and Canadian Acts should be made in our Act. Report of the High Powered Expert Committee on Companies and, MRTP Acts August, 1978 (Popularly known as Sachar Committees Report PP. 273-274.

cease and desist order which can at the best prevent a party indulging in the prohibited practice in future.

In pursuance of the recommendations of the Sachar Committee, the MRTP (Amendment) Act, 1984 provided section 12-B<sup>46</sup>. This provision armed the MRTP Commission with the powers to grant compensation. Since the inception of section 12-B, the commission attended a number of compensation applications as is revealed by the following table.

**TABLE : II**

**Statement showing the institution, disposal and pending compensation applications before the MRTP Commission under section 12-B.**

Year	Complaints at the beginning of the year	Complaints during the year	Complaints disposed of	Complaints pending
1985	Nil	107	3	104
1986	104	63	102	65
1987	65	1992	363	1694
1988	1694	2865	873	3686
1989	3686	2848	3069	3465
1990	3465	4070	441	7094
1991	7094	682	2141	5535
1992	5535	280	247	5568
1993	5568	359	5098	829

**SOURCE :** *The 15th- 23rd Annual Reports pertaining to the Execution of provisions of the Monopolies And Restrictive Trade Practices Act, 1969 for the period from 1st Jan, 1985 to 31st December 1993. After 1993 till data no further report has been published.*

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46. Section 12 B runs as follows:-

- 1) Where, as a result of the monopolistic or restrictive or unfair trade practice, carried on by any undertaking or any person, any loss or damage is caused to the central Government, or any State Govt. or any trader or class of traders or any consumer, such Government or as the case may be, trader or class of traders or consumer may, with out prejudice to the right of such Govt, trader or class of traders or consumer to institute a suit for the recovery of any compensation for the loss or damage so caused make an application to the commission for an order for the recovery from that undertaking or owner thereof, or, as the case may be, from such person, of such amount as the commission may determine, as compensation for the loss or damage so caused.

Section 12 B of the MRTP Act is a beneficial piece of legislation enacted in the interest of consumers, traders or the Governments which may have suffered loss or damage as a consequence of unfair trade practice carried on by erring undertakings. In construing such statutes, the universally accepted rule is that the courts must adopt, a beneficial rule of interpretation. That is to say if the statute reasonably admits such a construction, the interpretation which furthers the policy and object of the Act must be preferred to the construction which will defeat the object<sup>47</sup>.

**Locus Standi For The Grant of Compensation:**

An application for the compensation can be filed by central govt. or any state government, trader or class of traders or any consumer. The expression "Consumer" has not been defined in the MRTP Act. Section 12 B does not give any inkling about the locus standi of the person who is not an actual buyer of the goods or services. For example where a teaching shop owner advertises that he is running a computer course affiliated with A.M.U., the father of Z deposits fee for the admission of his son Z. If it is discovered later on that the said teaching shop has no affiliation, does Z have remedy by way of compensation under Section 12 B? By applying the traditional rule of privity of contract, Z.

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47. Y.P. Mahna V. Bharat Television (1994) 81 Comp Cas 27.

will have no remedy<sup>48</sup>. The other alternative is to give wider meaning to the words "any consumer" as advocated by the MRTP commission in *Y P Mahra (Supra)*. In this manner "any consumer" can be safely interpreted to include actual user, not necessarily the actual buyer<sup>49</sup>. However, in order to remove any doubt, better course is to incorporate the definition of consumer under the MRTP Act as provided under section 2(d) of the CP Act, 1986<sup>50</sup>.

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48. This English rule enunciated in *Tweddle v. Atkinson KB* (1977) 2 Levinz 210; 83 ER 523 and affirmed by the House of lords in *Dunlop Pneumatic Tyre Co. v. Self-ridge Co.* (1915) A.C. 847 was applied by the courts in India for instance see *Jamna Das v. Ram Autar*, (1911) 30 1A7, ILR 34 All 63; *Nanku Prasad Singh v. Kamta Prasad Singh*, AIR 1923 PC 54; *Basu Ram Budhu Mal v. Dhan Singh Biswas Singh*, AIR 1957 Punj. 169. The rule is that only the parties to the contract can sue each other and not a stranger.

49. For similar opinion see Venkat; *Unfair Trade Practices : Compensation For Loss or Damage*, (1985) 1 Comp LJ 117.

50. 'The definition runs as follows:

Consumer means any person who:

- i) buys any goods for a consideration which has been paid or promised or partly paid or partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; and
- ii) hires any services for a consideration which has been paid or promised, or partly paid and partly promised; or under any system of deferred payment and includes beneficiary of such services other than the person who hires the services for consideration paid or promised or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.

Section 36 B does not accord locus standi to trader but like section 12-A, section 12-B arms the trader with the power to file compensation application. Does it mean that before filing compensation application, it is not necessary that a prior inquiry be instituted? Section 12-B is silent on this point. The relevant words in sub-section(1) are "as a result of the monopolistic or restrictive or unfair trade practice..." These words do not show that inquiry is a condition precedent for filing compensation application. Furthermore clause (3) of section 12-B provides that the "commission may, after an inquiry into the allegations made in the application filed under sub-section(1), make an order directing the owner of the undertaking or other person to make payment..." The words used in this sub clause show that an independent inquiry is to be instituted under section 12-B. Thus it is not necessary that before filing an application for compensation, existence of any monopolistic, restrictive or unfair trade practice, must have been established through an inquiry. Through compensation application itself the allegation can be proved. Another point which weighs heavily in favour of the above interpretation is the standard of proof. Under section 36 D cease and desist order can be passed, if it is shown that the respondent is carrying on a trade practice which has a potential to cause loss or injury or there is likelihood that such loss or injury might be caused. It is not necessary that the complainant has suffered actual loss. But under section 12 B, proof of actual loss is a



condition precedent for grant of compensation<sup>51</sup>.

An interesting question arises relating to the law of Evidence that is, to what extent facts proved in an inquiry under section 36 D will be helpful under section 12-B? It is submitted that since these sections have different standards of proof, even if cease and desist order is passed under section 36-D, the application for compensation needs consideration de novo. This becomes more essential in a situation where respondent has voluntarily accepted the cease and desist order.

#### Application Of The Limitation Act:

The MRTP Act contains at present no provision either relating to the applicability of the Limitation Act or itself prescribing any limitation period within which compensation application should be filed. A crucial question<sup>arises as to</sup> whether the Limitation Act is at all applicable to the compensation application under section 12 B. The Australian Trade Practices Act, 1974 which is identical to section 12 B of the MRTP Act, 1969, through section 82 provides:

1. A person who suffers loss or damage by conduct of another person that was done in contravention of provision of part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention;

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51. See for similar views, S. M. Dugur, Law Relating to Restrictive and Unfair Trade Practices with Consumer Protection (1992, 2 ed.) at 118. See also Saling Ram v. Remal Public School, Compensation Application No's 1317 to 1326, 1341 to 51 & 1612, order dated 28.11.1989. Also see M L Sachdev; Award of Compensation under MRTP Act, (1985) 2 Comp. LJ 86.

2. An action under sub section (1) may be commenced at any time within 3 years after the date on which the cause of action occurred.

Since CP Act, 1986 also did not (before amendment) contain any express provision on limitation, it was nevertheless made clear by the National commission in *R. D. Chinoy v. Central Bank of India*<sup>52</sup>, that the limitation Act does apply to the proceedings under the Act. The absence of any specific provision in the Act however, should not give rise to any presumption that the application can be made at any time. It is an equitable principle of law that a person would lose his remedy if he falls asleep. Also no one is to be exposed to the risk of stale claims of which he may be quite ignorant and which he may not be able to meet in view of the changed circumstances. At present it can be presumed that the law of limitation applies to the compensation applications. However, the period of limitation would start from the date of loss or injury and not from the date the unfair trade practice was committed<sup>53</sup>. In order to avoid any possible controversy, it would be better to clearly spell out in the Act itself, the period of limitation for filing application under section 12 B of the Act.

#### Measure of Damages:

The compensation under section 12 B can be granted for the "loss or damage". As pointed out by the Punjab High Court in

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52. (1993)3 Comp LJ 105 See also *Citi Bank N. A. v. Ganesh Narian Sabro* (1993) 3 Comp. LJ 212; *Shri Rajesh Industries v. Punjab National Bank and Anr* (1991) 1 Comp. LJ 434.

53. Supra note 49.

*Chunilal v. Hardford fire Insurance Company*<sup>54</sup> that the word loss has no precise meaning. It is a generic and a comprehensive term covering different situations and is synonymous with damage resulting either in consequence of destruction, deprivation or even depreciation<sup>55</sup>. However, section 12-B does not lay down any standard which is to be applied in awarding compensation. The guidance for measuring damage can be had either, from the law of contract or law of torts.

This intriguing problem was realised by the MRTTP Commission itself when in *Bandani Chadha v. Sheri Loiuse Slimming centre*<sup>56</sup>, it was observed:

The term "loss" refers to both pecuniary and non pecuniary loss. "Damages" refer to the disadvantages that a person suffers as a result of the act or omission by another. While this is so, the measurement of compensation is probably a difficult aspect of the law as it stands at present, as the law no-where provides any suitable yardstick to measure compensation for loss or damage envisaged under section 12-B. In absence of such a statutory yardstick, what should be awarded as compensation becomes very important. It is well settled law that all losses or damages are not capable of being compensated. Only those which have a casual connection with the unfair trade practice or which are the proximate (and not remote) consequences of such unfair trade practices are compensable. Subject to this broad and acceptable parameter, what should be the measure of compensation, yet remains to be resolved, for the measurement of compensation in contracts is different from measurement of compensation in tort<sup>56a</sup>.

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54. AIR 1958, Punj, 440.

55. Id at 444.

56. (1991) Vol. 70 Comp. cas 712.

56a. Id at 718.

Under the law of contract the basic premise to award damages is as laid by Lord Haldane in *British Westing House Electric Ltd. v. Under ground Electric Railways Company*<sup>57</sup>, to place innocent party as far as money can do it, in as good situation as if the contract had been performed or as stated by Lord Wright in *Monarch Steamship Co. Ltd. v. Karlshamns*<sup>57a</sup>, that the broad principle of law of damages is that the party injured by the other party's breach of contract is entitled to such compensation as will put him in the position he would have been but for breach.

On the other hand, compensation under law of torts is governed by the maxim *restitutio in integrum* i.e. to place the victim in the same financial position, so far as this can be done by an award of money, in which he would have been had the accident not happened<sup>58</sup>.

MRTP commission without avowedly approving any standard, measured the compensation by involving both, contract and tort principles.

In *Krishna Kumar Sharma v. M/s Superfine Type-writers*<sup>59</sup>, the MRTP Commission observed that under section 73 of the Contract

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57. (1992) A.C. 673, 689.

57a. (1949) A. C. 196, 220 See also *Hadly v. Baxendale* of Ex 341, *Viction Laundry Ltd. v. Newsmen Industries Ltd.* (1949) 2 KB 528 CA Asquith J Laid down that it is well settled that the governing principle of damages is to put the party whose rights have been violated in the same position, as far as money can do so, as if his rights were observed. This opinion was adopted by AP High Court in *Dhulipudi Namayya v. Union of India*, AIR 1958 AP 533.

58. John G. Fleming, *The Law of Torts* (1957) at 225.

59. ,Comp. Law Digest Vol.18, December, 22.

Act, compensation is recoverable for any loss or damage (i) arising naturally in the usual course of things from the breach; or (ii) which the parties know at the time of the contract as a likely result from the breach. Thus in the first instance the liability depends upon a reasonable man's fore-sight of the loss and in the second instance it is subjective because the extent of liability will depend upon the knowledge of the parties about the probable result of the breach<sup>60</sup>.

Another Bench of the MRTP Commission in Mrs. *Bandana Chadha and Ors v. Sheri- Louise Slimming centre*<sup>61</sup> applied a different scale when it observed:

In an action for fraudulent misrepresentation, the amount of damages to which the applicant is entitled is, prime facie, the amount by which the price has been paid, exceeds the true value of the thing bought . A basic principle for measure of damages in tort is that there should be *restitutio in integrum*. In an action for deceit the proper starting point for the assessment of damages is to compare the position of applicant as it was, before the fraudulent statement was made to him, with his position as it becomes as a result of reliance upon the statement.

It is submitted that it is in the interest of the consumers if MRTP commission applies principles of law of torts instead of law of contract for the following reasons:

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60. Id at 23.

61. Supra note 56.

- 1) Under law of contract there is a well established rule that while quantifying the damages, the terms in the contract should be construed strictly where as under law of Torts, courts award exemplary damages also, so as to deter the wrong doer from causing harm to the society.
- 2) Under the law of contract courts generally do not award punitive damages. Since under MRTTP Act, perpetrator of wrong cannot be imprisoned, compensation can be used as a tool to prevent unscrupulous trader from resorting to *unconscionable* business practice which is possible under law of Torts and not under the Contract Act<sup>62</sup>
- 3) Since the Australian law is analogous to the MRTTP Act, the Australian court in *Figgin Pty Ltd. v. Centre Point*<sup>63</sup>, held that the damages to be recovered are to be determined in a manner similar to deceit cases. The principles to be applied are similar to those applied in determining the measure of damages in tort, and in *Ess-petroleum co. Ltd. v. Mardon*<sup>64</sup> it is laid down that the correct way to approach the assessment of damage is to compare the position in which the applicants might have been expected to be if the misleading conduct had not occurred with the situation they were in as a result of acting in reliance on the conduct.

#### Duty to Mitigate:

The explanation attached to section 73 of the Contract Act provides for the duty to mitigate damages<sup>65</sup> and under the law of torts the point to be taken into account is whether the victim

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62. However punitive damages may be granted in some special cases, The American Restatement of the law of contracts, section 342 provides punitive damage where the breach was wanton or reckless and caused bodily injury. see also *Adds v. Gramophone co. Ltd.* (1909) AC 488; *Jarvis v. Swan Tours Ltd*, (1973) 1 AILER 71 CA; *Jackson, v. Horizon Holidays*, (1975) 3 AILER 92 CA; *Andard Mount (London) Ltd. v. Curewel (India) Ltd.*, AIR 1985 Del 45; *Prema v. Mustak Ahmad* AIR 1987 Guj 106.
  63. (1981) 36 ALR 23 see also *Brown v. Jam Factory* (1981) 35 ALR 79
  64. (1976) All E.R.S
  65. This explanation runs as follows: In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

endeavoured to mitigate the loss arising from the tortious act<sup>66</sup>. The question is, to what extent this duty to mitigate is applicable under section 12-B of the MRTP Act. In other words, is the consumer under duty to avoid the loss which may be the likely result of the any unfair business practice? The MRTP commission in *Anis Khan v. Kaypee Land and Finance (P) Ltd.*<sup>67</sup> answered it in affirmative. It was laid down that the law which comes to the help of unwary consumers also expects them to exercise the prudence of a reasonable man, before entering into deals involving expenditure of huge amount. It is expected of people who book/purchase commercial spaces or other immovable property to have minimum precaution of satisfying themselves about the legal approval of competent authority, existence of the property site and other apparent precautions before entering into such deal.

It is submitted that the above stand taken by the Commission does not augur well with the world wide change which has taken from the common law maxim of Caveat Emptor to Caveat Venditor. It has to be borne in mind that the aim of the whole body of consumer laws is to protect gullible, unwary, credulous, unprotected, unthinking consumers. They need extra protection from the unscrupulous traders bent to fleece them. Even otherwise why

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66. See *Neeu Anand v. Shri Louse slimming Centre*, Comp. L Digest, Vol. XX, Sept. 1990, 49.

67. (1994) 1 Comp LJ 47.

should law expect from a docile consumer "minimum precaution" and not to expect from the trader to come with full truth instead of half truth. As lord Denning M R declared in *Doyle v. Olby (Ironmongers) Ltd.*<sup>68</sup>, that "it does not lie in the mouth of the fraudulent person to say that the result could not have reasonably been foreseen. "and an Australian court in *State of South Australia v. Johnson*<sup>69</sup> went ahead by placing unfair trade practices in the realm of wrong of deceit and not under negligent misrepresentation. In former, plaintiff recovers the difference between the amount paid and the value of the property acquired, the object being to place him in a position equivalent to that which he would have occupied, had the transaction not taken place and in latter case, the plaintiff's damages are limited to that which were reasonably foreseeable.

The above opinion of the commission, it is submitted will bolster the dishonest traders and will not further the cause of innocent consumers who believe in values and upright-ness. It is therefore suggested that the present approach adopted should be done away with and trader should be burdened with a duty to come with full disclosures likely to affect the decision of the consumers failing which, compensation should be awarded to the consumer for any loss or damage so caused by the unfair business practice employed by the trader.

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68. (1969) 2 Q. B. 158 at 67.

69. (1982) 42 ALR 161.



### Application of Mens-rea:

The twin maxims, Actus non facit reum nisi mens sit rea (the act itself does not make a man guilty unless his intention was so and actus me invito factus non est mens actus" which means an act done by me against my will is not my act at all, have been ruled as bereft of any application in the offences perpetrated on consumers as Prof. Jerome Hall puts it.

To meet new important social problems like sale of narcotics, sale of adulterated food, in toxicating liquors, etc. the application of the rule of strict liability has to be enforced<sup>70</sup>.

Since consumer offences fall under the category of the public welfare offences<sup>71</sup>, it has been argued that such

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70. Jerome Hall : General Principles of Criminal Law, 2nd ed. PP.327-28, see also American Jurisprudence, 2nd Vol. at 864 wherein it is laid down that "the distribution of impure or adulterated food for consumption is an act perilous to human life and health, hence a dangerous act cannot be made innocent and harmless by the want of knowledge or good faith of the seller". Prof Waddames opines that one who sells any product in a defective condition unreasonably dangerous to the user or the consumer or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer of or to his property, if (a) the seller is engaged in the business of supplying such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. The rule stated in (a) and (b) above applies even though (i) the seller has exercised all possible care in the preparation and sale of his product and (ii) the user or consumer has not brought the product from or entered into any contractual relation with the seller. Waddames S. M. : Strict liability of Suppliers of Goods (1974) 37 Mod. L. Rev. 154 at 160.
71. Sayre Francis owes; Classifies Public Welfare offences into eight categories and the sale of impure or adulterated food or drugs and misbranded articles fall second and third items in his list see Public Welfare Offences (1993), 33 Col. L. Rev. 55.

offences create absolute liability<sup>72</sup>. While deciding cases under the prevention of the Food Adulteration Act, 1954 which is another consumer protection legislation and violation of which invites penal consequences, it has been held in a number of cases that mens rea has no application<sup>73</sup>. Under this backdrop the question arises, is it open for the respondent to come up with the defence that unfair business practice which caused loss or injury to the complainant, was caused by him without any malice or bad intention on his part. The answer without any reservation is in negative not only in view of the foregoing discussion but also because of the fact that under the MRTP Act, only plausible remedy is the compensation as a reparation to the wrong done to the consumer. Since under MRTP Act there's no provision for imposing fine or sentencing wrong doer to imprisonment, hence the compensation serves twin purpose. It gives consumer money equivalent to the loss caused and it deters trader from indulging in the injurious trade practices. So it will not be in the interest of the consumer to make compensation available subject to the presence of mens-rea on the part of wrong doer.

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72. For detailed study on the topic see Jackson, R. M.: Absolute Prohibition in Statutory Offences, (1936) 6 Com. LJ 83; Radzinowicz and Turnor (Ed); Modern Approaches to Criminal Law (Collected Essays), 1984 P. 262.

73. See *M/s Bhagwan Das Jagdish Chandra v. Delhi Administration and Anr.*, AIR 1975 Sc 1309, wherein justice Alagiriswamy observed that under the prevention of Food Adulteration Act it is not necessary to establish mens-rea, i.e, criminal intention either on the part of the manufacturer or distributor or vendor. Id at 1319, see also *Pyaarali K. Tejani v. Mahadeo Ram Chandra Bange and Ors* 1975 F. AJ. 429 at 438; *Bhola Nath Sahu v. State* (1973) Cr. LJ 135 (ori) at 138.

### Consumer Class Action:

In the words of Hans Kelsen: The validity of legal system and of the rules there of depend upon their being by and large effective, that is, upon their being realised in actual conduct. Pressing a rule of conduct to the point of assertion of right by way of legal action is the acid test of the efficacy of law ... Rules which establish non-justiciable rights are imperfect or cosmetic existing merely on paper and not susceptible of being translated into effective action<sup>74</sup>. Rights can be enjoyed only when there is a mechanism for their effective protection. Such protection is best assured by a workable remedy within the framework of the judicial system<sup>75</sup>.

Judged by such notion of effectiveness, consumer law lacks a spirit of realism<sup>76</sup>. Specialised enforcement agencies are chronically short of manpower and resources, a consequence not only of necessarily limited public funds but also because of the approach of the Government which have kept consumer rights enforcing agencies in blues<sup>77</sup>.

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74. Pure theory of Law, at 32

75. M. Cappelletti, Access to Justice, vol. III, at 517.

76. Gordon Borrier and Dubrey Diamond, The Consumer Society and the Law, (4th ed. 1981) at 337.

77. See Deleep Goswami, Supreme Court to Rescue of Consumers (1989) 3 Comp LJ 89. The Supreme Court in *Mahindra and Mahindra v. Union of India*, AIR 1979, Sc 798 Lamented and said : it appears that the Central Govt. paid scant regard to this legislative requirement and though the office of the Chairman fell vacant as far back as 9 August, 1976, it failed to make appointment of Chairman Until 24 Feb. 1978. Of the two other members of the Commission, one had already resigned earlier and his vacancy was also not filled with the result that the commission continued with only one member for a period of

Present consumer concern is largely accredited to modern technological developments which heralded the end of torpor of legislators and consumerists. Aggressive advertising campaign clouded the consumer choice. It becomes very difficult even on reasonable examination to differentiate between the goods although of different grade, quality and standard. This provided a good scope for playing fraud on gullible consumers. It is rightly said by Rosenberg<sup>78</sup> that it is difficult to determine accurately the dollar cost of fraud to consumers. More alarming are the findings of research study conducted by the University of Pennsylvania Law School. It was found that in many instances fraudulent operators carefully avoid cheating individuals out of large sums of money because they realise that no one bilked out of fifty dollars is going to pay a lawyer to get his money back .... The number of consumers who have not redressed because the amount lost is not commensurate with the attorney's fee, constitute the vast majority<sup>79</sup>. This lends support to the

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about 18 months. This was most unfortunate state of affairs, for it betrayed total lack of concern for the proper constitution and functioning of the commission and complete neglect of its statutory obligation by the Central Govt. we fail to see any reason why the Central government could not make necessary appointments and properly constitute the commission in accordance with the requirements of the Act Id at 806.

78. Mark L. Rosenberg, Consumer Class Action, Har. Civ. Reg. Civ. Lib. L.Rev; 1972, Vol.7 at 602.

79. Pennsylvania Comment 409. This study was funded by the Shelton Harrison Foundation and involved extensive interviews with businesses, lawyers and bankers in Pennsylvania, New York, New Jersey and other areas of the country.

observation that it is better to take one dim from each of 10 million people at the point of corporation than \$100,000 from each of 10 banks at the point of gun<sup>80</sup>. This in fact is a well thought out strategy that although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, yet no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals is too small to warrant it<sup>81</sup>. It was found by the State Commission of Rajasthan in *Upbokta Sarankshan Munch v. M/s Windsor Foods Ltd*<sup>82</sup>, that by selling a biscuit packet only 25 gms less than the prescribed 500 gms, Windsor cheated public to the tune of more than one lakh in one year in a state of Rajasthan alone.

While Juxtaposing above facts there is a little doubt about the need of mechanism through which even small claims can be redressed. India, an under developed country has its own limitations. Poverty, illiteracy, ignorance of rights, lack of information are factors responsible for consumer exploitation. Furthermore, to move to the court for small claims is a taboo. So in India consumer class action or to allow any member of a class to pursue the cause of the class is a social necessity.

The class action concept developed as an exception to the equity rules of compulsory joinders in order to avoid multiple

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80. C Wright White Collar Crime at (G Geis ed.) 1968.

81. F.T.C v. Kelsner (1929) 280 US 19 at 28.

82. (1993) 2 CPR 610.

actions and effectuate complete settlement of disputes where the interested parties were numerous for joinder<sup>83</sup>.

In USA credit goes to the courts of California for fashioning the representative action doctrine as an alternative to joinder. California supreme court, while articulating rules for the application of this doctrine held, where the question is "one of general or common interest", or where parties form a voluntary association for public or private purposes, the persons interested are commonly numerous and any attempt to unite them all in the suit would be, even if practicable, exceedingly inconvenient<sup>84</sup>, recourse can be had to class action.

At the federal level Rule 23 of US Civil Procedure Code takes care of class action suits. The requirements for class action are:

1. there be a definable class of plaintiffs.
2. there be common question of law and fact, and
3. representatives fully and adequately protect the interest of the class<sup>85</sup>.
4. The common question must predominate over individual questions<sup>86</sup>.

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83. For analysis of the development of rules governing class actions under various statutory and common law frame works see Z. Chafee; Some Problems of Equity (1950).

84.1. Cal. 55 (1850).

85. Rule 23 (2).

86. Rule 23(b)(3).

5. The best notice practicable under the circumstances, including individual notice to all members who can be identified through a reasonable efforts must be given<sup>87</sup>.

The scope of federal class action under Rule 23 was limited by US supreme court by holding that the individual claims of class members can be aggregated only if they are enforcing a single right in which they have common interest and common question must predominate the individual questions<sup>88</sup>. Individual notice must be sent to class members who can be identified with reasonable efforts<sup>89</sup>. The idea that the core purpose of Rule 23 is the adequacy of representation and not the notice, was rejected by courts and what is reasonable effort was left unexplained<sup>90</sup>.

By requiring individual notice, US consumers faced precarious situation because to right mass wrongs through class action, membership of the class may run into millions and an amount also in millions may be required for individual notice<sup>91</sup>. This proved most serious obstacle in the maintenance of class action suits. Commenting on these findings, Richards H. S. Tur remarks:

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87. Rule 23(c)(3).

88. Synder v. Harris, 394 US 332 (1969).

89. Eisen v. Carlise & Jacquillin 417 US 156 (1974).

90. For Critical Comment see Peterh Schuck & Marshan Cohen, The Consumer Class Action : An Endangered Species, San Diego L. Rev (1974) Vol. 12:39 at 63.

91. In Eisen's case supra note 16, total membership of the class was 6,000,000. Approximately 2,250,000 could be identified with the reasonable effort and this would have cost to Eisen \$ 225,000 not to mention the additional cost of publication notice to the others.

In principle there is less than compelling reason to notify all members of the class in advance that a case is to be filed and certainly no reason at all that any such notification be by way of individual letter to each member rather than by news paper, radio or television advertisement<sup>92</sup>.

The Federal Consumer Class Action Act, 1976 to a great extent diluted the narrow approach which US Federal courts had adopted, while interpreting Rule 23 of the Federal Civil Procedure Code. Instead of common question predominating the individual question, the Act requires that the question of law and fact common to the members of the class must be substantial, when compared to question affecting only individual members<sup>93</sup>. Notice cost will be borne by representative, the defendant or both as the court deems fit<sup>94</sup>.

In England, Order 5 Rule 12 of the Rules of the Supreme Court provides:

Where numerous persons have same interest in any proceeding... the proceeding may begin and unless the court otherwise orders, continued by or against any one of them as representing all except one or more of them<sup>95</sup>.

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92. Richard H. S. Tur, litigation And The Consumer Interest, the class Action and Beyond, Legal Studies, Vol.2, No.2; July 1982 at 157.

93. Section 8 (2)

94. Section 8 (b)(4)

95. Rule 12 (1)



The expression "same interest" was interpreted as "common interest and common grievance"<sup>96</sup>. The scope of Order 5 Rule 12 was constricted by Kings Bench in *Markt Co v. Knight Steam Ship Ltd.*<sup>97</sup> by holding that the cause of action arising out of different contracts even by same device and by same dealer will not be redressed through representative suit. It was considered appropriate only for injunctive relief. This narrow interpretation was relaxed in *Prudential Assurance Co Ltd. v. Newman Industries Ltd.*<sup>98</sup> by following a split procedure theory, through which representative suit can be instituted and when court is satisfied that the defendant is liable, then each member of the class will have to bring separate action to establish the damages actually suffered. Hitherto, representative suit in England is available only in situations as contemplated by Lord Willbforce in *Wooder v. Wimpey*<sup>99</sup> that where one individual books a meal in a restaurant for a group and all suffered food poisoning, or one individual books a coach which fails to arrive thereby all the members of the party suffer. It implies that there should be same cause of action arising out of the same transaction.

In Canada though all provinces permit class action, non permits the same for damages. The root of this proscription is the opinion expressed in English *Markt and Co.*<sup>100</sup> case that

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96. Dube of Bedford Vellis, (1901) ACI at 9.

97. (1910) KB 104.

98. (1979) 3 All E.R. 507.

99. (1980) 1 All E.R. 571 at 576.

100. Supra note 97.

damages are personal to the person suffering them, there is no common interest amongst those who have suffered the damages. Several attempts have been made to persuade the courts to ignore the Markt case but of no avail. Commenting on this approach a Canadian author observes "There is every reason to modernize the rules of court to remove the milestone of Markt doctrine and to introduce the safeguards along the lines of Rule 23 of the American Federal Rules of procedure to prevent abuse of the new remedy<sup>101</sup>.

Amendments were proposed in Combines Investigation Act, 1923 to encourage private enforcement. Through these amendments one suit can be commenced by an individual or a group of persons on behalf of a class which is based on common question of law and fact<sup>102</sup>. The case can be sustained if the court is satisfied that (1)it is undertaken in good faith, (2)that prima facie it has merit (3)that it provides the fairest and most efficient means of adjudicating the dispute and those initiating it can adequately represent the interest of the class as a whole<sup>103</sup>. However, its application is restricted to damages caused by the commission of offences under the Combines Investigation Act and does not extend to other transactions<sup>104</sup>.

In France, selected groups are entitled to pursue the cause of consumers. In civil action for damages for enforcing collec-

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101.. Supra note 97.

102. Section 39.12 (2) (b).

103. Ibid Section 39.12 (2)

104. Christopher S AX Worthy, Recent Developments in Consumer law in Canada Int. Comp. Quart. L. Rev. Apr. (1980) at 386.

tive interest of the group of the consumers. However, more significance is attached to securing observance of the law than to obtaining damages. In Germany, Consumer groups are specifically authorised by statute to sue on behalf of the consumers. However, they can seek only injunctive relief and damages cannot be claimed on behalf of the consumer<sup>105</sup>.

Indian consumers enjoy a rare distinction as they can vindicate their rights by class action simpliciter or the internal plaintiff class action (representative suit) and by the public interest class action or an external plaintiff class action. Simpliciter class action is provided under section 12 B (2) of the MRTP Act which runs as:

Where any loss or damage referred to in sub section (1) is caused to numerous persons having the same interest one or more of such persons may, with the permission of the commission, make an application, under that sub section for and on behalf of, or for the benefit of the persons so interested, and there upon the provisions of rules and of Order 1 of the first schedule to the Code of Civil Procedure, 1908(5 of 1908), shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to the application before the commission and the order of the commission thereon.

So far as external plaintiff class action is concerned like France, standing is granted to voluntary registered consumer organisations, under section 36B [a]. But all that glitters is not gold. This statutory right of standing to registered consumer organisations came for deliberation before MRTPC in *Voice v.*

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105. Fisch (1979) 2 American J. of Comparative L 51 at 79.

*Bharat TV & Ors.*<sup>106</sup> It was observed that a voluntary organisation cannot sue in representative capacity on the ground that such organisation cannot have the "same interest" as required under section 12 B(c). This decision has thus closed the doors for voluntary organisations to file a suit in representative capacity. This will not be out of place to mention that granting of locus standi to voluntary consumer organisations was a policy decision taken by the Government of India in the year 1986. So not only MRTP Act, 1969 but other Acts were also amended to provide locus standi to registered consumer organisations<sup>107</sup>. This inclusion of the provision for locus standi was necessitated by the fact that beneficiaries of these legislations, generally belong to weaker sections of the society, who have not made effective use of the legal process for vindication of the rights conferred on them. It is not as much vindication of private right as protection of public interest which is avowed objective of legislation in conferring locus standi<sup>108</sup>. It is therefore, suggested that either in the MRTP Regulations or MRTP Act, an explanation be attached to provide that a recognised consumer

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106. RTPE No. 138/1984 order dated 6.12.1985.

107. Prevention of Food Adulteration Act, 1956, Drugs And Cosmetics Act, 1940. Standard of Weights and Measures Act, 1956, and Essential Commodities Act, 1955.

108. For critical analysis see D N Saraf, Monopolies and Trade Practices Commission in Action - Some Reflections on Consumer Protection, 31 JILI (1989) 289, See also of the same author, some facets of consumer justice through CDRA 34 JILI (1992) 36.

association shall be deemed to have the same interest as other consumers on whose behalf the consumer association has filed the complaint.

Another important issue of topical interest is what constitutes "same interest". For English courts, it implies common grievance and common interest arising out of the same transaction or contract which can be redressed through the same cause of action (Supra). On the otherhand, American approach is that there must be common question of law and fact and common question must predominate the individual question (Supra).

Since consumer class action in India is yet at the take off stage, so this expression (same interest) was not put to interpretation. Consumer class action provided under MRTP Act and CP Act is based on order 1 rule 8 of the Civil Procedure Code. The expression "same interest" was interpreted to mean "same cause of action". Later on an explanation was added to order 1 rule 8 on the recommendations of the 54th Report of the Law Commission. It was made clear that the same cause of action is not necessary for representative suit. However, while interpreting order 1 rule 8, the courts invoked English markt doctrine and held that the class action cannot be maintained where damages are claimed<sup>109</sup>. It is submitted that this observation will not hold good so for

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109 *Janki Das v. John Bull Ltd.*, 1910 "The Times" April 10. See also *Gindey v. Anglo Indian Association*, AIR 1930 Rang 117 (1819).

consumer representative suit is concerned as the MRTP Act<sup>110</sup> and CP Acts<sup>111</sup> expressly provide that compensation can be claimed through class action to make good the loss caused due to monopolistic or restrictive or unfair trade practices.

Present Indian practice is in favour of American approach. it has been held that "same interest" does not mean "identical interest" and it includes similar but distinct interest and it is not necessary that it should arise from the same transaction<sup>112</sup>. Similarly in *Consumer Protection Council v. Lohia Machines Ltd and Ors*<sup>113</sup>, Gujarat State Commission held that the interest of the consumers and society at large will be better protected if voluntary consumer associations are permitted to file complaint covering the persons "similarly situated" when the cause of action arises out of the same act or transaction or series of acts or transactions against the same respondent.

Thus it is clear that Lord Willbiforce's opinion expressed in Wooder's case, (Supra) that the representative suit is possible only where cause of action arises from the

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110. Section 12 B(2).

111. Section 12 (c) read with section 14(d).

112. Mulla Code of Civil Procedure (1972) at 329. However, MRTPC in Devendra Kumar v. Indian R. CO. Ltd. held that the word "similar" does not connote "same" CA No.200/1989 in UTPE/5/1987.

113. (1992) ICPR 128.

same transaction is devoid of any effect so far as representative suit in India is concerned. Instead, the test is that the persons should be "similarly situated". This test brings us more closer to the American test of common question of law and fact. This is encouraging trend and boon to consumer movement and in turn to consumer justice.

There is of course an American experience which shows that the results of class action are, clogging the courts, main beneficiaries being the attorneys and not the class, using class action by unscrupulous lawyers to strike a settlement (a legalised blackmail) problems of disbursement of damages against the class members, difficulties of proof by an individual member of the class, notice to the individual members<sup>114</sup>. But it should be noted that such difficulties flow from the nature of American legal system and legal profession than from any inherent shortcoming of the class action procedure. For example in India, contingent fee charged from the clients in the event of success is illegal and any such agreement is unenforceable as being opposed to public policy. Individual notice to the members can be dispensed with, where it is impracticable. Further, notice-cost will not be as high as in America. There is of course difficulty in distributing damages. But the choice lies between no remedy and appropriate remedy.

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114. Leela Krishna (ed), Consumer Protection and Legal Control, S. N. Jain, Standing and Public Interest Litigation at 109.

## POWER TO REVIEW ORDERS

The power to review orders is based on equity, justice and good conscience as there is a possibility that the earlier order, recorded by the court is not based on the actual evidence or other material error might have influenced the judgment or the order was passed under the circumstances which no longer exist<sup>115</sup>. Justice demands that the earlier order should be reviewed in the light of the new circumstances. Since no human being is infallible so are judges. Reversal of the earlier order implies Judicial uprightness.

As Supreme Court in *Palace Administration Board v. Rama Verma*<sup>116</sup> observed:

Once a clear judgment is revealed, no sense of shame or infallibility complex obsesses us or dissuades this court from the anxiety to be ultimately right and not consistently wrong.

However, it should not be interpreted to mean that the decision after review is always absolutely correct. But of course, second thought minimises the errors which might have crept in the decision for one reason or the other. The often quoted opinion of J. Jackson throws light on the proposition.

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115. *Association of the State Road Transport undertaking New Delhi and Ors v. Premier Tyres Ltd., New Delhi, and Ors.* (1994) 2 Comp LJ 146; In *Delhi Pipe Dealers Association*, the MRTPC observed that its decisions are given in the context of economic situation prevailing at the time when decision was given. Any basic change in the situation might alter the very foundation of decision and may call for change in decision itself. 1975 Tax. L. R. 2034 (MRTPC).

116. (1980) 3 SCR 187; AIR 1980 SC 187.



He comments:

Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook, normally found between personnel comprising different courts. However, reversal by a higher court is not a proof that Justice is thereby done. There is no doubt that if there were a super Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible but we are infallible because we are final<sup>117</sup>.

In tune with the overall scheme of laws, MRTP Act provides a provision for amendment or revocation of the orders through review. Section 13(2) runs as follows:

Any order made by the commission may be amended or revoked at any time in the manner in which it was made.

The above provision raises the following problems of interpretation. Is this power unlimited or, is it subject to inherent limitations? what is the extent of the commission's power? Does the expression "in the manner in which it was made", implies that the commission by invoking this provision, can order fresh hearing?

A plain reading of the above provision makes it abundantly clear that there are no fetters placed on its scope. This provision is different from that of section 22 of the English Restrictive Trade Practices Act, 1956 under which a court can discharge the previous order only when there is a prima facie evidence of

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117. *Porawn v. Allen* (1952) 344 US 443, 540.

material change in the relevant circumstances. It is the discretion of the Commission whether to exercise power or not under this provision. However, the discretion cannot be arbitrary vague or fanciful. It must be guided by relevant considerations<sup>118</sup>.

Although there are no apparent limitations on this power, it cannot be construed so wide as to permit rehearing on the same material<sup>119</sup>. It has to be kept in mind that basically this is a corrective or rectificatory power, so it cannot be exercised to order fresh hearing.

The expression "in the manner in which it was made" cannot be construed as giving power to the commission to make fresh order in the same way as previous order was made i.e. by hearing parties and witnesses. But it merely indicates a procedure to be followed by the commission in amending or revoking an order. The expression has no bearing on the content of the power granted under section 13(2) or on its scope and ambit<sup>120</sup>.

Another interesting question is, can a case decided by one Bench of the commission be reviewed by another Bench?

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118. *Mahindera and Mahindra v. Union of India* AIR 1979 Sc 798 at 813.

119. Id at 814.

120. Id at 812. The MRTD Commission followed this opinion of the Supreme court in a number of cases eg. In the matter of *M/s Fedders Iyod Corporation Pvt; Comp. Law Digest 1987 (Vol.17) at 63; DG (I&R) v. Shara India Savings & Invst. Corp Ltd. (1993) 1 Comp. LJ 316; Ghasita Mal Mela Ram, Delhi v. Ballapur Industries Ltd New Delhi And anr. (1992) 2 Comp. LJ 252; Indian News Paper Society v. Indo-Japan Photo Films Co. Ltd. And anr. (1991) 71 Comp. Cas 260.*

In *M/s Meltex (India) Pvt. Ltd.*<sup>121</sup>, an order for preliminary investigation was issued against the respondent by the Chairman of the Commission, the respondent came with an application, requesting to amend the order. The Chairman referred the matter to a Bench comprising of DC Aggarwal and H C Gupta. They came up with conflicting observations.

DC Aggarwal observed that the relevant Regulation<sup>122</sup> of the MRTP Commission provides that an application for review under section 13(2) shall attract the provisions of section 114 and order 47 of the Code of Civil Procedure, 1908 as far as possible. rules 5 and 6 of the said Order provide that where the judge/ judges who made the order, a review of which is applied for, continues or continue attached to the court at the time when the application for review is presented, such judge or judges or any of them shall hear the same. It therefore, means that where an order is made by two judges out of which one may have left, the other one should hear the review application.

Another Member, H. C .Gupta observed that the Chairman of the Commission has been given power under the MRTP Act, to constitute Benches<sup>123</sup>. So it is in the discretion of the Chairman to decide as to who should be the member of a particular Bench.

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121. In the Maltex of *M/s Meltex (India) Pvt. Ltd. Comp. L. Digest* (Vol.17) 1988 at 63.

122. Regulation 85 of the MRTP Commission Regulation, 1974.

123. Section 10 (2).

This power of the Commission cannot be taken away by Regulation 85 of the MRTP Regulation, 1974. Thus a review application can be heard by a member or members different from those who had decided the case earlier.

Akin to the above issue is, whether a larger Bench can decide the review application. The MRTP Commission, while answering it in affirmative in *CERC v. Pressure Cooker Appliances Ltd*<sup>124</sup>, laid down that it is a well settled principle of law that the Regulation made under the provisions of any law cannot have precedence over any of the provisions of that law. Regulation 85 which makes rule 5 Order 47 of the Civil Procedure Code applicable to the review application, is inconsistent with section 16(2) of the MRTP Act. While this section authorises the chairman of the Commission to constitute Benches, rule 5 Order 47 takes away that power from the Commission by providing that it is only the Judge or Judges who heard the case at the first instance, must hear the review application also. Further, rule 5 is also inconsistent with section 13(2). This section gives power to the commission, to review its own order but rule 5 confers this power to those judges only who had passed the original order.

In order to augment its view point, the MRTP Commission called in aid the decision of the Supreme Court in *AR Antulay v.*

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124. C.F.Supra note 121.

*R.S. Nayak and anr*<sup>125</sup> in which (in the opinion of the Commission) seven member Bench heard review application against the decision handed down by a Bench of five members.

It is submitted that the above two rulings of the commission (Meltex and Pressure Cooker) are open to question on the following grounds:

1. Like Regulation 85 of the MRTPC Regulation 1974, ... rule 12 of the Delhi High court rules<sup>126</sup>, makes section 114 and Order 47 of the Civil Procedure Code applicable to review applications. Yet, it (rule 5 of Order 47) has been never considered by the Delhi High court, in consistent with the power of the Chief Justice to constitute Benches.
2. The Supreme court rules while making rule 1 Order 47 of the Code of Civil Procedure applicable to review applications, expressly exclude the application of rule 5 Order 47. Had exclusion of the application of rule 5 Order 47 of the Civil Procedure Code intended by the legislature, an exclusionary clause similar to the Supreme Court rules would have found place in Regulation 85.
3. The help taken from the Supreme Court's ruling in *AR Antulay* (Supra) is not at all available as the petition in that case was heard by the apex court in an appeal and not in review.
4. The constituting of larger Bench is nothing short of hearing the matter again, as if it were a court of appeal against the order of a two member Bench. The Supreme Court in *Mahindra and Mahindra* (Supra) made it clear that the order of review cannot be construed so wide as to order rehearing on the same material on which the previous order was passed.

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125. AIR, 1981 SC 1531.

126. Delhi High Court (Original Side) Rules 1967 Chapter XIII.

5. However, the point which goes in favour of the judgment in *Pressure Cooker Appliances Ltd.* is that the one member of the Bench who handed down the earlier order had retired and another member (D.C. Aggarwal) of the Bench could not have alone reviewed the order passed by the two member Bench. This exigency is recognised in rule 5 Order 47 itself. Instead of laying stress on this point, MRTPC tried to arrogate the power under section 16(2).

### **POWER TO PUNISH FOR CONTEMPT**

In an ordered community, courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interest of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed, it is not because those charged with the responsibilities of administering justice are concerned for their own dignity. It is because the very structure of ordered life is at risk if the recognised courts of the land are so flouted<sup>127</sup>.

The MRTPC Commission had no power to punish for contempt although the Sachar Committee did recommend a provision for it,<sup>128</sup> yet it was not carried by the parliament when the MRTPC (Amendment) Act, 1984 was passed. However, the MRTPC (Amendment) Act, 1991 provided a provision by carving out section 13-B, which runs as follows:

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127. *Attorney General v. Times News paper.*

128. The Sachar Committee had recommended : The Commission shall be a court of Record and shall have all powers of such court including the power to punish for contempt of itself, Id at 280.

The Commission shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High court has and may exercise and, for this purpose the provisions of the contempt of courts Act, 1971 shall have effect, subject to the modifications that

- a) the reference therein to a High court shall be construed as including a reference to the commission;
- b) the reference to the Advocate General in section 15 of the said Act shall be construed as a reference to such law officer as the Central Government may, by notification in the official Gazette, specify in this behalf.

Since this provision is of recent origin, the MRTTP Commission did not find opportunity to deliberate on it. However, section 13-B makes directly the Contempt of Courts Act, 1971 applicable, so guidance can be had from the principles laid down by the High Courts and Supreme court on the nebulous issues.

Section 2 of the Contempt of Courts Act, 1971 defines it as under:

- a) Contempt of Courts "means civil contempt or criminal contempt;
- b) Civil Contempt means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;
- c) Criminal contempt means the publication (whether by words, spoken or written or by signs or by visible representations, or otherwise, or any matter or the doing of any act whatsoever which
  - i. scandalise or tends to scandalise or lowers or tends to lower the authority of any court, or
  - ii. prejudices or interferes or tends to interfere with the due course of any judicial proceedings,

iii. interferes or tends to interfere with or obstructs or tends to obstruct, the administration of justice in any other manner.

d) "High Court" means the High court for a state or a union territory, and includes the court of the Judicial Commissioner in any Union territory.

The self imposed limitation of the courts<sup>129</sup> on contempt application is that where there is an effective alternative remedy for enforcing the decree by normal execution proceedings, it will not be proper for the courts to exercise jurisdiction under the Contempt of Courts Act. This dictum if applied to the MRTP Act, a case for civil contempt will rarely be made as the punishment provided under section 12 of the Contempt of Courts Act is a maximum of 6 months simple imprisonment or with a fine which may extend to two thousand rupees or with both. Even an apology may sometimes suffice. On the other hand, the punishment under section 48C of the MRTP Act for violation of the orders of the commission is a minimum of six months (for otherwise reasons have to be recorded) which may extend to 3 years and with fine which may extend to 10 lakh rupees. However, only effectiveness which Contempt of Courts Act has, is the summary nature of the proceedings whereas section 56 of the MRTP Act empowers the

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129. See for instance: *Dr. Bimal Chandra Sen v. Mrs. Kamla Mathur*, 1983, Cr LJ 495 (Del); *Indus Tewari v. Ram Bahadur*, AIR 1981 All 309; *Indu v. Ram Bahadur Chaturvedi* AIR All 309; *Ram Rup Pandey v. R. K. Bhargava*, AIR 1971 All 231; and *Calcutta Medical Stores v. Stadmed*, (1977) 81 Cal. WN 209.



courts to try offences and commission itself cannot take cognizance<sup>130</sup>. Nevertheless Madras HC in *Ramalingam v. Mahalinga Nador*<sup>131</sup> observed that it is not expedient to involve contempt jurisdiction as a mode of executing a decree, or merely because other remedies may take time, or are more circumlocutory in character.

Section 2 of the Contempt of Courts Act makes wilful disobedience of even direction of the courts as a ground for contempt. This will include injunction issued by the MRTTP Commission under section 12 A. Section 12 A itself makes the provisions of rules 2A to 5 (both inclusive) of Order XXXIX of the first schedule to the Code of Civil Procedure, 1908 (5 of 1908) applicable to the injunction under the MRTTP Act. The question arises then; can the violator of injunction be prosecuted for contempt of the MRTTP Commission under section 13-B or be brought within the confines of rule 2-A of Order 39 CPC. The Calcutta HC in *Samir Kumar Sarkar and ors v. Maharaj Singh*<sup>132</sup> and Delhi High Court in *Bimal Chandra v. Kamla Mathur*<sup>133</sup> held that it is a well settled

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130. Section 56 runs as; No court inferior to that of a court of session shall try any offence under this Act. The Sachar Committee had suggested that it is more appropriate that the economic offences under the Act should be tried by the Commission which is an expert body and more suited for this purpose than the Magistrate. This suggestion was not accepted by the Government.

131. AIR 1966 Mad. 21.

132. 1983 Cri LJ NOC 11 (Cal).

133. 1983 Cri LJ 495 Del. See also *Indu Tewari v. Ram Bahadur* AIR 1981 309.

principle of law that when there is a special law and general law, the special law prevails over the general law since special procedure and provisions are contained in CPC itself under Order 39 rule 2-A for taking action for the disobedience of an order of injunction, the general law of contempt of court cannot be invoked in such cases which is primarily reserved for what essentially brings the administration of justice into contempt or unduly weakens it .

Section 36-D(2) of the MRTP Act allows the commission not to pass cease and desist order where respondent gives an undertaking to remove the prejudicial effect of the trade practice. It is not clear as to whether violation of such undertaking be called as violation of section 36-D so as to bring erring respondent within the clutches of section 48-C. Section 2 of the Contempt of Courts Act, 1971 expressly provides that even wilful disobedience of the undertaking given by the court is treated as civil contempt. So section 2 of the Contempt of Courts Act will take care of the grey area left by section 36-B(2) of the MRTP Act. It is provided in Halsbury's laws of England<sup>134</sup> and followed by the courts<sup>135</sup> in India without any reservation that an undertaking given to a court by a person or corporation in pending proceedings, on the

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134. 4th Ed. Vol. 9; P. 44.

135. See *Virochen v. Ram Saran Dass*, 1982 Cr. LJ 1219 (P & H); *Saleemuddin v. Sharafuddin*, AIR 1980 Del. 39; *Sudhir Bhasim v. Babu Ram* ILR (1979) 1 Del. 280; *Mangal Thakur v. Sundar Bhagat* AIR 1977 Pat. 282 and *Chhanganbhai v. Soni Chandubhai* AIR 1976 Sc 1909.

faith of which the court sanctions a particular course of action or inaction has the same force as an injunction made by courts and a breach of the undertaking is misconduct amounting to contempt.

In fact it is the criminal contempt as defined in section 2(c) which gave teeth to the MRTP Commission. In order to determine whether the alleged contemner has committed contemptuous act under section 2(c), the test is to see whether the words complained of were in the circumstances calculated to obstruct or interfere with the course of justice and the due administration of law<sup>136</sup>. If a judge is defamed in such a way as not to affect the administration of justice, he has the ordinary remedies for defamation. Thus one is a wrong done to the judge personally and the other is a wrong done to the public<sup>137</sup>. It is the latter and not the former which is contemptuous.

#### Standard of Proof and Justification for Contempt:

A ticklish question arises in case of standard of proof in contempt proceedings. Since section 2 of the Contempt of Courts Act, 1971 defines both civil and criminal contempt, a moot point is what should be the standard of proof as it varies in civil and criminal proceedings. The Karnataka High Court in *K. Adinarayan v. S. Mariyappa*<sup>138</sup> held that the jurisdiction to make an order

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136. *Prasad v. Emperor*, AIR 1943 PC 202.

137. B. R. Verma, *Law of Contempt of Court* (2nd Ed. 1986) at 96.

138. 1984 Cr LJ 992 Kant.

for contempt is per se, neither civil nor criminal but is sui generis. The Supreme court in *MR Parashar v. Dr. Farooq Abdullah*<sup>139</sup> held that contempt must be proved beyond doubt. The rationale of this approach has been spelt out by the Division Bench of Madras High Court in *Syed Azimudin v. Syed Mazharuddin*<sup>140</sup> that in the matter of contempt of court, the court apply the rules regarding evidence which are applicable in criminal cases, though the contempt may be of civil nature. The stigma attached to the person found guilty of contempt and the punishment imposed on him are serious matters and therefore, the courts must be wary and must punish only those who are conclusively found to be guilty of flouting the orders of the court.

On the question as to what should be (if any) justification for a contemptuous act, the Supreme Court came up with the conflicting observations. The apex court in *Perspective Publication v. State of Maharashtra*<sup>141</sup> opined.

Truthfulness or factual correctness is a good defence in an action for libel but in the law of contempt there are hardly any English or Indian cases in which such a defence has been recognised.

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139. 1984 Cr LJ 337 SC.

140. 1977 2 MLJ 464.

141. 1971 Cr. LJ 268 see also *C K Daphtary v. O P Gupta* AIR 1971 SC 1132, if evidence was to be allowed to justify allegations amounting to contempt of court, it would tend to encourage disappointed litigant.

Justice Mukherjea in *Bathina Ramakrishna Reddy v. State of Madras*<sup>142</sup> observed that the article in question is a scurrilous attack on the integrity and honesty of a judicial officer. Specific instances have been given where the officer is alleged to have taken bribes or behaved with impropriety to litigants who did not satisfy his dishonest demands. If the allegations were true, obviously it would be to the benefit of the public to bring these matters into light. But if they were false they cannot but undermine the confidence of the public in the administration of justice and bring the judiciary to disrepute<sup>143</sup>.

It is worth while to mention here that in England Justice<sup>144</sup> in their Report on contempt of court in 1959 suggested that good faith should be considered a good defence but statement should be made not to press but to the lord Chancellor<sup>145</sup> or to his MP. The Phillimore Committee however recommended that the truth should be considered as a valid defence where publication was for public benefit<sup>146</sup>. The Law Commission has recommended that only false

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142. 1952 SCR 425.

143. Id at 434.

144. Justice, is the name of the British Section of the International Commission of Jurists.

145. In England Lord Chancellor has a power to remove judicial officers below High Court level if they misbehave.

146. Phillimore Committee Report, Para 166.

allegations should be subject to sanctions<sup>147</sup> English Jurists have also in unequivocal terms supported that the fair comment and good faith should be considered a valid defence<sup>148</sup>.

## POWER TO PASS CEASE AND DESIST ORDER

The power to pass cease and desist order was already in the armoury of the MRTP Commission to control restrictive trade practices, when a chapter on unfair trade practices was incorporated. This power was given to the Commission on the recommendations of the Monopolies and inquiry Commission<sup>149</sup> and was extended to unfair trade practice through section 36-D which is as under:

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147. Offences Relating To Interference With The Courts of Justice(1979) law come No. 96 Para 364-370.

148. Lord. Denning observed: We do not fear criticism nor do we resent it. For there is something more important at stake. It is no less than freedom of speech itself. It is the right of every man, in parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment matters to Public interest. In the same vein opines Salmon LJ. No criticism of a judgment however vigorous, can amount to contempt of court provided it keeps within the limits of reasonable courtesy and good faith Cf Supra note 127 at 93.

149. The Monopolies and Inquiry Commission observed: Where the judicial examination results in a finding that no restrictive trade practice is being pursued or that though such a practice is being pursued, it is in the interest of the general public, or that it does not work to the common detriment, no further action need to be taken except that the decision should be given proper publicity in a suitable way. Where the decision is otherwise, in other words, where the finding is that one or more enterprises are guilty of pursuing a restrictive practice to the common detriment, something in addition to giving publicity to the finding is called for. We think the most fruitful line of action would be the issue by the commission itself of an order to discontinue the practice.

The commission may inquire into any unfair trade practice which may come before it for inquiry and if after such inquiry, it is of the opinion that the practice is prejudicial to the public interest, or to the interest of any consumer or consumers generally, it may by order direct that:

- a. the practice shall be discontinued and shall not be repeated; and
- b. any agreement relating to such unfair trade practice shall be void or shall stand modified in respect thereof in such manner as may be specified in the order.

The working of the MRTP Commission shows that it has not passed cease and desist order so vigorously as it ought to have, keeping in view the rush of the inquiries instituted against the unfair trade practices. This finding is based on the following table.

**TABLE - III**

**Statement showing year wise institution and disposal of the inquiries U/S 36 D(i) and cease and desist orders passed thereof.**

Year	No. of enq. brought forward	No. of enq. inst. during the year	No. of enq. disposed of during the year	No. of enq. pending at the end of the year	No of cease & desist orders passed
1984	Nil	54	6	53	Nil
1985	53	96	60	89	Nil
1986	89	256	87	258	1
1987	258	512	155	615	26
1988	615	428	270	773	57
1989	773	196	318	651	31
1990	651	175	249	577	22
1991	577	168	238	507	11

**SOURCE:** *The 14th - 21st Annual Reports pertaining to the Execution of the Provisions of the MRTP Act, 1969. The 22nd and 23rd Annual Reports do not contain such information.*

Section 36-D Not in Consonance With Section 36-B

Section 36-B deals with the issue of locus Standi and grants standing not only to the consumer, consumer association, trade association, central and state Governments and Director General but also empowers the MRTP Commission to file a complaint sue motu either upon its own knowledge or information. On the other hand, section 36-D provides that the "Commission may inquire into any unfair trade practice which may come before it for inquiry". This expression does not embrace within its import the suo motu inquiry which Commission is competent to institute by virtue of section 36-B. There is no decision from the Commission on this point vis-a-vis unfair trade practices. However, similar issue was agitated with respect to restrictive trade practices under section 37-D in *I.T.C. v. MRTP Commission*<sup>150</sup> and it was observed that the words "come before it" do not necessarily mean that it would come before the Commission from other sources than its own knowledge and information. This is a beneficial construction of the expression and it is suggested that the same interpretation should be given to section 36-D. However, in order to avoid any possible controversy, it is suggested that the words "which may come before it for inquiry" be omitted from section 36-D.

A very interesting question arises in respect of the unfair trade practice which has been discontinued before the MRTP Commission passes cease and desist order. A trader may adopt an unfair trade practice and when a complaint against him is filed

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150. (1975) 2 Comp LJ 274.



before the MRTP Commission, he may discontinue that practice. This fact received judicial notice in England with respect to restrictive trade practice and lord Evershed made, the following observations:

It was the intention of the parliament to prevent what might otherwise be a simple means of evading the Act, i.e. by cancelling any relevant agreement as soon as there was any threat or likelihood of it being brought before the Court, then reviving it immediately after any proceeding had ended<sup>151</sup>.

The Allahabad High court while over-ruling the opinion of the single judge Bench in *R D Saxena v. J K Synthetics Ltd. and ors*<sup>152</sup> held that the proceedings under section 37 were not rendered futile by the expiry of the period for which the impugned agreement was entered into. The powers of the Commission to inquire into restrictive trade practices were not exhausted by the discontinuance of the practice, whether before or during the pendency of the inquiry. However, the approach of the MRTP Commission in respect of the unfair trade practice has been quite opposite. The Commission has dropped proceedings once it has been brought to its knowledge that the alleged unfair trade practice in question has been discontinued<sup>153</sup>. This approach, it is submitted, will provide an escape route for the trader as envisaged

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151. Cf. H.M.Jhala, The Law of MRTP in India (1981) at 196.

152. Special Appeal No.249 of 1976 decided on 15.6.1978 3 RTPI 478.

153. See for details 15th - 23rd Annual Reports of the MRTP Commission Pertaining To The Execution of The provisions of The MRTP Act, 1969.

by Lord Evershed (Supra). Therefore, it is suggested that an Explanation be attached to section 36-D making it mandatory for the Commission to launch fulfilled proceedings irrespective of the fact whether the prohibited practice is in force or has been discontinued. On reaching to the conclusion that the disputed practice although discontinued, was prejudicial to public interest, a desist order can be passed so that if it is repeated, the violator will be punished under section 48-C. If the approach as suggested, is not adopted, then the Commission cannot punish the violator for repeating a prohibited practice as section 48-C makes punishable the Commission's orders and mere dropping of proceedings cannot by any stretch of imagination be called as an order.

The above suggested interpretation is in conformity with the provision of 36-D(1) which says that the Commission may by order, direct that the practice shall be discontinued or shall not be repeated. The words "or shall not be repeated" refer to those practices which have been already discontinued. The word "or" is significant. Had the intention of the legislature been different, then instead of "or" "and" should have been used.

The other question is as to whether the cease and desist order precludes any trader from employing any other unfair trade practice which was not in question when the said order was passed. Section 36-D(1) is silent on this count. But MRTP Commission in *Vadodara Saher Grahak Mandal & Ors v. Rajesh Patel*<sup>154</sup>

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154. (1991) 3 Comp LJ 179.

laid down that an order of the Commission directing the respondent that "he shall not indulge in the impugned unfair trade practice as per the notice of enquiry", should be construed as an order preventing the respondent from continuing not only the prohibited practice which was in question but also any other unfair trade practice which he might carry on in future<sup>155</sup>.

It is submitted that the opinion of the Commission satisfies the spirit of the Act. Since unlike Trade Description Act, 1968 (England), the MRTP Act does not make mere indulgence in unfair trade practice as an offence but has its role limited to cease and desist order which can at the best be called an order "to stop and sin no more", the present approach will deter a trader from indulging in unfair trade practice, once a cease and desist order is passed against him. Nevertheless, the opinion is not in accord with the letter of law. As Section 36-D(2) provides that "such practice" shall be discontinued "and not" such practices "shall be discontinued".

Secondly, section 13(3) clearly states that an order made by the Commission may be general in its application or may be limited to any particular class of traders or particular class of trade practice or particular locality. Thus it must be spelt out in the order itself, whether the Commission wants to proscribe only the practice in question or such like practices which the respondent is likely to adopt in future.

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155. Id at 181.

Section 36(D) prohibits an unfair trade practice which is prejudicial to public interest or the interest of the consumer or consumer's generally. It is not clear as to whether, the Commission can pass cease and desist order under sub section (1), of section 36-D where the unfair trade practice is prejudicial to any trader or manufacture. Under section 36-B a complaint can be filed inter alia by a trade association and a trade association has been defined as a body of persons formed for furtherance of the trade interest of its members<sup>156</sup>. A single trader or a class of traders cannot file a complaint. Naturally no cease and desist order can be passed even if the practice is injurious to competing trader or class of traders. Since under section 12-A injunction can be granted on the application of a trader or class of traders and under section 12-B compensation can be granted to a trader or class of traders, so there is a need for harmonious construction of sections 12-A, 12-B, 36-B and 36-D. This can be possible only by interpreting the words "public interest" under section 36-D as to cover both, class of traders as well as a single trader<sup>157</sup>.

However, it is suggested that like consumer, trader may be accorded locus standi under section 36-B and Commission be empowered to pass cease and desist order, where a trade practice is

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156. Section 2(1).

157. S. M. Dugar holds also similar opinion see S. M. Dugar law Relating to Restrictive and Unfair Trade Practices with Consumer Protection (1992) at 412.

prejudicial to competing trader. Since traders as compared to consumers are more alert and conscious of the tricks employed by their competing traders, so arming them with the power to file complaint, will give boost to the consumer movement. It will be quite apposite to mention here that in USA, section 5 of the original Federal Trade Commission Act, 1914 was interpreted to cover relief only to the rival traders and the rationale was that competing traders will force each other not to resort to unfair business practices and consumer will automatically get fair deal. It is only through wheeler lea Amendment Act, 1938 that the reach of the Federal Trade Commission Act, 1914 was extended to consumers also.

#### Consent Order:

There is a school of thought which believes that if business has to be regulated, it can be through persuasion and not by sanctions and for proper functioning of the regulatory system it is sine qua non that the people are to be consulted and given an opportunity to express their views on it<sup>158</sup>. This is perhaps the reason that the legislature gave option to the MRTP Commission either to pass cease and desist order or to pass consent order. Section 36-D(2) provides that the Commission may, instead of making any order under this section, permit any party to carry on any trade practice, if it so applies and take such steps within the time specified by the Commission as may be necessary to

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158. D. N. Saraf; Monopolies and Restrictive Trade Practices Commission in Action -- Some Reflections on Consumer Protection 31 JILI (1989) at 303.

ensure that the trade practice is no longer prejudicial to public interest or to the interest of any consumer or consumers generally, and in any such case, if the Commission is satisfied that the necessary steps have been taken within the time so specified, it may decide not to make any order under this section in respect of that trade practice.

The MRTP Commission while invoking section 36-D(2) has approved a good number of consent orders as is shown by table IV below:

**TABLE : IV**

**Statement showing year wise Institution and disposal of inquiries relating to unfair trade practices and approval of consent orders by the Commission under section 36-D(2).**

Year	No. of enquiries instituted	No. of enquiries disposed	No of consent orders passed
1984	54	6	Nil
1985	96	60	58
1986	256	87	83
1987	512	155	106
1988	428	270	296
1989	196	318	249
1990	175	249	223
1991	168	238	198

**SOURCE:** *The 14th - 21st Annual Reports pertaining to the Execution of the Provisions of the MRTP Act, 1969. The 22nd and 23rd Annual Reports do not contain such information.*

The working of the MRTP Commission shows that under section 36-D(2) enough latitude is given by the commission to the business tycoons, indulging in unfair trade practices. The Commission accepted the qualified undertakings like the one as under:

That the respondent has not committed any RTP/UTP. without in any way admitting the RTP/UTP, the respondent undertakes not to repeat it<sup>159</sup>.

What is worst, section 36-D(2) enjoins the MRTP Commission to ensure that the respondent has taken appropriate steps to purge the business from the taint of being prejudicial to the public interest, the Commission never bothered to monitor the trade practices adopted by the respondent subsequent to the consent order<sup>160</sup>.

A point is, where Commission issues a consent order under section 36-D(2), can that order be appealed under section 55 by the Director General or any other complainant, if they are not satisfied with such order? One possible interpretation is that section 36-D(2) says that "instead of making an order" which means that the consent order under 36-D(2) is not an order at all and hence not appealable under section 55. The other view is that the decision "not to make an order" under section 36-D(2) would be taken as an order itself and hence appealable<sup>161</sup>.

A question similar to the above is relating to the violation of the consent order. In other words where a respondent under-

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159. Cf Ibid.

160. Supra note 153. MRTP Commission is empowered under section 13-A to order investigation either by the DG or by any other person to verify whether respondent has complied with the orders of the Commission or not.

161. H. M. Jhala holds this opinion in respect of section 37 which is almost similar to section 36-D. See supra note 151 at 203. See also Delhi Pipe Dealers Association v. Indian tube co. ltd. and anr RTPE No. IA/74 MRTPC order dated 25.12.75.

takes not to repeat the practice, can commission launch prosecution under section 48-C against such respondent if he violates his own undertaking or it has to pass first cease and desist order before taking such action. The language of section 48-C reads as under:

If any person contravenes any order made by the Commission under section 36-D, he shall be punishable with imprisonment which shall not be less than six months term or which may extend to three years and with fine which may extend to ten lakh rupees.

The language of section 48-C is clear on the point that so far as section 36-D goes there is no difference between the order passed under section 36-D(1) and 36-D(2). Violation of both these orders invite penal consequences.

Thus it is submitted that even consent order is an order and violation of which will result in penal consequences under section 48-C. This is a proper interpretation, otherwise consent order will provide a gate-way of escape for respondent who will give readily an undertaking knowing fully well that the breach of it is not going to affect him in any way.

Another nebulous issue surrounding section 36-D is the competence of the MRTP Commission to pass consent order without holding a full-fledged inquiry as envisaged under sections 36-C and 36-E read with section 11. In other words the point in issue is can the MRTP Commission pass consent order without holding inquiry as otherwise required? There is no authority on this point from the MRTP Commission vis-a-vis unfair trade practices.



However, with respect to restrictive trade practices, the Commission in *Delhi Pipe Dealers Association v. Indian Tube Co. Ltd.*<sup>162</sup> answered it in affirmative. However, Calcutta High Court in *Bengal Potteries Ltd. v. MRTP Commission*<sup>163</sup> imposed a condition by saying that the requisite permission can be granted only to the parties to a restrictive trade practice. Before exercising any discretion under section 37(2) of the Act, the Commission must come to the conclusion that the applicant is a party to the restrictive trade practice. However, if the applicant concedes that an assumption be made that the conditions for the application of section 37(1) do exist, the application can be entertained. It is submitted that the above ruling is beneficial as it will save time, money and energy of the Commission and the desired object can be achieved at the earliest. So it is suggested that a similar approach be adopted with respect to unfair trade practices also.

### **Power To Order Corrective Advertisement**

False or misleading advertisement once viewed has its own life. Once a false or misleading advertisement has been successful in creating an image among the masses, there will be residual effect of the unlawful advertising, which will continue to influence the consumer's decision to purchase, even after the unlawful advertising itself has been discontinued<sup>164</sup>. Studies

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162. 1975 Tax. LR 2034.

163. (1975) 2 Comp LJ 401.

164. Ferald J Thain; Consumer Protection : Advertising - The FTC Response; The Business Lawyer, April, 1972 at 894.

have indicated that there is normally a delayed response by consumers to advertisements<sup>165</sup>. This delayed consumer response to or residual effect of an advertisement, is a recognised phenomenon in advertising<sup>166</sup>. The cease and desist order rightly called as an order to go and sin no more<sup>167</sup> is often ineffective as it does not help to dissipate the false impression previously created by such advertisement.

The premise of corrective advertising is that it can prevent this continuing deception by eliminating the false impression that may result from the lingering effect of a false or misleading advertisement. It is aimed at correcting this false impression in a manner calculated to gain exposure equal to that of the initial deception<sup>168</sup>.

Like MRTP (before Amendment Act, 1991) and CP Acts, the Federal Trade Commission Act of USA does not expressly provide any power to the Federal Trade Commission to order for corrective

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165. International Encyclopedia of the Social Sciences. Advertising at 107-108 (1968) See also Charlton & Fawcett, The FTC and False Advertising, 17 UK, Law Review 599, 600 (1969).

166. Id at 108.

167. Robert Pitsofsky; Beyond Nadar : Consumer Protection and the Regulation of Advertising. Harv. LR. Vol. 90 (1977) at 687.

168. Corrective Advertising - The New Response to Consumer Deception, 72 Colum. L. Rev. 415 (1972) at 416. However in England the Trade Descriptions Act, 1968 Review Committee recommended against corrective advertising. It thought that it might fail to reach those who were misled. For Criticism of this view see Ross Cranston, Consumers and the Law (1978) at 61. In Australia a provision to direct advertiser to issue corrective advertisement is provided under section 80-A of the Trade Practices Act, 1974.

advertisement. However, in *ITT Continental Banking Co*<sup>169</sup>, the Federal Trade Commission went beyond the traditional cease and desist order. In this case respondent was falsely advertising that its bread product designated by the trade name "Profile" was effective for weight reduction. The Federal Commission gave option to the respondent, either to cease and desist from disseminating the advertisement for a period of one year from the date of this order, or to spend not less than 25% of total expenditure (excluding production cost) for each media in each market, for advertising in a manner approved by the authorized representatives of the Federal Commission that profile bread is not effective for weight reduction, contrary to possible interpretations of prior advertising. In the case of radio and television advertising, such advertising is to be disseminated in the same print media as other advertising of profile bread.

It is submitted that this judgment has to a great extent militated the deterrent effect of the corrective advertisement by giving option to the advertiser, not to advertise his product for one year. Since the objective of the corrective advertisement is to dissipate the lingering effect of false or misleading advertisement, how this residual effect can be removed by simply stopping the advertiser from advertising the product for one year? In order to achieve the desired result from corrective advertising, proper approach is to direct the advertiser to spend not less than 25% of the total advertising cost on corrective

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169. 36 FED REG 18,522 (1971).

advertising, for the period, for which false advertisement had been shown<sup>70</sup>.

The circumstances in which corrective advertisement may be ordered have been outlined in *Warner - Lambert Co v. Federal Trade Commission*<sup>171</sup>. The tests are (1) the deceptive advertisement must have played a substantial role in creating or reinforcing in the public mind a false belief which survives even after the false advertising ceases. (2) there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief and injury cannot be averted by merely requiring respondent to cease disseminating the advertisement.

It is submitted that the case of *Warner-Lambert*, has laid down a high standard for invoking the corrective advertisement remedy. This case was unusual. It had disseminated advertisement for fifty long years and broadcast up to the date of suit. The manufacturer has claimed that the mouthwash was effective in ameliorating, preventing and curing cold and sore throats. There was persuasive evidence that the claim was believed by purchasers at least upto the time of suit. So record did support each of those findings. It is difficult to apply this standard in hard

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170. The FTC has already recognised that in certain cases the option of refraining from advertising for a year will not be available. New York Times, Dec. 3, 1971, p. 27 Cf. Supra note 5.

171. 1977, 562 F 2d. 749.

cases. Even in America it has been argued that if these issues are made relevant in the corrective advertising context and the burden of proof for each is placed on the commission staff, the remedy would be imposed rarely<sup>172</sup>.

Robert Pitofsky has proposed that in order to invoke the remedy of corrective advertising, the commission should prove

1. the existence of a material fraud or deception with respect to a major advertising theme;
2. that his fraud created in a substantial number of consumers a misconception about the product; and
3. that this misconception significantly influenced the purchasing decisions of these consumers<sup>173</sup>.

Even Pitofsky's proposition will not at present suit Indian scheme of things. Clause (2) and (3) will require objective analysis of consumer views which can be obtained through surveys only. In India, at present there is no Governmental or Semi Governmental agency which can undertake this job, so to elicit the consumer views about a particular advertisement, is not easy.

The MRTP (Amendment) Act, 1991 has incorporated clause (c) in section 36(d) which runs as follows:

Any information, statement or advertisement relating to such unfair trade practice shall be disclosed, issued or published as the case may be, in such manner as may be specified in the order.

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172. Supra note 4 at 697.

173. Ibid.

Thus whether a corrective advertisement can be ordered, or not, depends upon the Commission's own assessment of the situation. If situation demands, Commission has now express powers to issue corrective advertisement which is independent of the consumer perceptions. What should be the duration of such advertisement? How long shall it go and what should be the media, on which it will be displayed, are the questions which the Commission has to decide himself.

### Corrective Advertising and The Constitution:

Art 19(i)(a) of the Indian constitution guarantees Freedom of Speech. The question which came for judicial determination in *Hamdard Dawakhani v. Union of India*<sup>174</sup> was whether commercial advertising falls within the freedom of speech? The apex court answered it in negative for the reason, that the commercial advertisements propagate the efficacy, value and importance of goods and not the ideas, social, political or economic<sup>175</sup>. However, more than two decades later, the apex court changed its opinion in *IE News paper Bombay Ltd. v. Union of India*<sup>176</sup> and held that the observations made in the *Hamdard Dewakhana* case are too broady stated. The commercial advertisements cannot be denied the protection of Article 19 (1)(a) of the Constitution merely

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174. AIR 1960 Sc 551.

175. Id at 563 See also Ushodaya Publications Pvt. Ltd. v. AP (81) A.A.P. 109 (FB).

176. AIR 1986 Sc 515.

because they are issued by businessmen<sup>177</sup>. In a recent case of *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*<sup>178</sup> the Supreme court went ahead by extending the protection of Art. 19(1)(a) not only to advertisers but also consumers. It was laid down that this Article guarantees not only freedom of speech and expression but it also protects the rights of the individual to listen, read and receive the said speech. So far as the economic needs of citizens are concerned, their fulfilment has to be guided by their information, disseminated through the advertisements. The protection of this Article is available to the Speaker as well as to the recipient of the speech<sup>179</sup>.

After elevating commercial advertisements to the status of speech and expression<sup>n</sup> guaranteed under Art. 19(1)(a), the question arises, is this freedom absolute or subject to some restrictions?

The American Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*<sup>180</sup> made it clear that the extending of protection of first constitutional amendment to commercial advertising does not mean that the protection is absolute and admits no restriction. Some forms of commercial speech regulations are surely permissible<sup>181</sup> and in *Central*

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177. Id at 547.

178. AIR 1995 SC 2438.

179. Id at 448.

180. (1976) 425 US 748.

181. Id at 1830.

*Hudson Gas and Electric Corp. v. Public Service Commission of New York*<sup>182</sup>, the court laid down four pronged test to enable the advertisement to reap the benefits of first amendment. These are: 1) to determine whether the activity is lawful i.e. it should not be misleading (2) whether the asserted Government interest is substantial, if both inquiries yield positive answers, then it must be determined (3) whether the regulation directly advances the governmental interest (4) and whether it is not more extensive than is necessary to serve that interest. The restrictions propounded in the Central Hudson are in-applicable in India for the reason, that the courts in India do not enjoy the freedom to impose restrictions which they consider reasonable like the American courts. In America, the first amendment simply says that "congress shall not make any law.... abridging the freedom of speech or of the press". In India restrictions are mentioned in Art. 19 itself which are declared reasonable and courts have no scope to impose any restriction which is not mentioned in Art. 19(2). This restriction on the power of courts is realised by the apex court also. In *Tata Press Ltd. v. Mahanagar Telephone Nigam*<sup>183</sup>, it was aptly made clear:

Unlike the first amendment under the American Constitution, our Constitution itself lays down in Art. 19(2) the restrictions that can be imposed on the Fundamental rights guaranteed under Art. 19(1)(a) of the Constitution.

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182. (1980) 447 US 557.

183. Supra note 179.



This corrective advertising generated a debate in America as to its constitutionality.

Roseden<sup>184</sup> believes that the corrective advertising remedy is devoid of constitutional mandate for the following reasons:

1. Corrective advertisements are indirect or secondary restraints imposed by an administrative action<sup>185</sup>. Such restraints are prior restraints which are permissible either in a statute imposing penal sanctions under the far reaching procedural safeguards provided in the American legal system<sup>186</sup> or if it comes within one of the established exceptions to the bar of first amendment. Since Federal Trade Commission Act, 1914 is not a penal statute, nor procedural safeguards as that of penal sanction are provided, and it also does not come under any of the exceptions to first amendment, so corrective advertising is unconstitutional.
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184. Roseden; A Treatise on the law of Advertising Vol.1, 1978 at 9-43.

185. Roseden is in agreement with the classification of prior restraint propounded by Prof. Emerson in his Article "The Doctrine of Prior Restraint," 20 Law and Contempt. prob 648 (1955). Prof. Emerson divides the circumstances to which prior restraint applies into 4 classes. The fourth class is "Indirect or secondary restraints. This covers the restraint imposed by the administrative action. Roseden is of the opinion that this fourth class of prior restraints covers corrective advertising also Id, 9 - 10.

186. Roseden opines that if a civil proceeding is available against a prior restraint and if such civil proceeding contains safeguards equal to those governing a criminal proceeding such prior restraints may be also permissible in matters other than those concerning obscenity. This observation of Roseden is infact based on the combined effect of the cases; Near v. Minnesota, 283 US 697, 717; Kingsley Books Inc v. Brown 354 US 513 (1958) and Speiser v. Randall 357 US 513 (1958). However, he himself admits that in any event, we have rarely, if ever seen civil proceedings prescribing safeguards equal to the traditional safeguards of criminal proceedings, so that in final analysis, the broadening of the exceptions as contained in Kingsley and Speiser, is unlikely to have any practical effect.

2. Corrective advertisements are not in comport with the first amendment as the thesis underlying the corrective advertising is that it erases the residual effect of the deceptive advertisement but no reliable surveys as to such retention are available. So its duration and its effect are purely speculative. To invade the property right of the persons on the ground of a speculative concept is wholly arbitrary. Furthermore, the retention for any length of time extends only to the name of a product or to a slogan that has been repeated incessantly and possibly to the general purpose of the product. Therefore, unless past deception is inherent in the name of a product or in the slogan, there is little if any retention. It is certainly unwarranted to infer from the fact of retention of a brand name or a slogan those details of advertisements which have been deceptive<sup>187</sup>.

Roseden while questioning constitutionality of corrective advertising, has his eye on the first and fifth amendments of the American Constitution and judicial gloss put on these amendments. It is to be seen how far his observations hold true to Indian Constitution.

The fundamental right of freedom of speech and expression incorporated in Art. 19(1)(a) stands on different footing than the first amendment to American Constitution. The American Constitution does not contain any restriction to the freedom encompassed, whereas Art. 19(2) itself lays down the restrictions which can be imposed on freedom of speech and expression. This marked difference was realised by Douglas J in *Kingslay Corporation v. Regents of the University of New York*<sup>188</sup>, it was laid down:

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187. Supra note 29a at 9-29

188. 360 US 684, 698.

If we had a provision in our constitution for reasonable regulation of the press such as India has included in her's there would be room for argument that censorship in the interest of morality will be permissible.

The Supreme court of India also in unequivocal terms made it clear in *Santokh Singh v. Delhi Administration*<sup>189</sup> when it was held:

In our opinion, it is hardly fruitful to refer to the American decision, particularly when this court has more than once enunciated the scope and effect of Art. 19(1)(a)... our constitution provides reasonable, precise, general guidance in the matter. *It would then be misleading to construe it in the light of American decisions given in the different context*<sup>190</sup>.

Thus the opinion of Rosen in *Shelton v. Texas* shall not apply mutatis mutandis to the Indian Constitution. However, the question which needs an answer here is, whether the effect of prior restraint of corrective advertising is sufficient to quash this remedy as unconstitutional? The Supreme Court of India in a *K A Abbas v. Union of India*<sup>191</sup> allowed the precensorship of cinematography films and opined that it does not violate freedom of speech and expression as these restrictions are permissible on the grounds of decency and morality. On the same analogy prior restraints in the guise of corrective advertising shall not infringe Art. 19(1)(a) provided of course Art. 19(2) permits such restrictions. In *Tata Press*

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189. (1973) 3 SCR 533 See also *Iran-Cochin v. Bombay Co. Ltd*; 1952 SCR/112 *Bombay v. M D Chamarbang-walla* 1957 SCR 878.

190. M H Seervani : Constitutional Law of India, 3rd ed. Vo.1 at 491

191. (1971) 2 SCR 446.

*Ltd. v. Mahanagar Telephone Nigam*<sup>192</sup>, the apex court declared that the false, deceptive and untruthful advertisements would be hit by Art.19(2) and can be regulated/prohibited by the State. However, the court did not give any inkling about the ground under which such advertisements will be prohibited, as the grounds like false, deceptive and untruthful do not find place under Art 19(2) which runs as under:

Nothing in sub clause (a) of clause (1) shall affect the operation of any law or prevent State from making law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said subclause in the interest of the sovereignty and integrity of India, the security of the state, friendly relations with the foreign state, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

Furthermore, it is now well established through judicial dicta<sup>193</sup> that the restrictions which are imposed for securing the objects which are enjoined by Directive principles of state policy included in part iv of the Constitution may be regarded as reasonable restrictions within the meaning of clause (2) - (6) of Art. 19. Therefore, Art. 38(1) merits mention here:

The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Further Art 14 permits classification and not class legislation. A classification between fair and false/ deceptive advertisement is permissible under Art 14.

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192. Supra note 183.

193. *State of Bombay v. Valsara* (1951) SCR 682; *Bejoy Cotton Mills v. State of Ajmer*, AIR 1955 SC 33 *Orient Weaving Mills v. Union of India* 1962 Supp. 3 SCR 487; *Hanief Qureshi v. State of Bihar*; AIR 1958 SC 731.

Thus Arts.14,19(2) and 38(1) allow the placing of reasonable restrictions on commercial advertisements on the grounds of decency, morality<sup>194</sup> and for the welfare of the public. These expressions are of wide connotation<sup>195</sup> but they are circumscribed by an equally important condition, that is, these restrictions must have a rational relation to the object sought to be achieved. The problem in India is to determine modes operandi of these restrictions. Section 36-D of the MRTP Act, 1969 gives option to the MRTP Commission either to pass cease and desist order or consent order. The commission has been armed with the power by MRTP (Amendment) Act, 1991 to direct the respondent that

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194. It is worth while to mention here that after amendments to MRTP Act in 1991, the definition of unfair trade practice is almost similar to section 5 of the Federal Trade Practices Act, 1914 as amended by the Wheeler Lea amendment Act 1938. The Supreme Court of America in FTC v. Sperry and Hutchinson laid down the tests to determine whether a trade practice is an unfair one. These tests revolve round the broad parameters of decency and morality which are as follows:

- a. Whether the practice without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise -- whether, in otherwords it is within atleast the penumbra of some common law, statutory or other concepts of unfairness.
- b. Whether it is immoral, unethical, oppressive or unscrupulous. Whether it causes substantial injury to consumer: 405 us 233, 244-54.(1972).

195. The words decency and morality should not be given narrow interpretation as enunciated in R V Hicklin (1868)3 QB 360 or as provided under statutory definition incorporated in obscene Publication Act, 1959 of England but what may be regarded as decent and moral from the business point of view.

any information statement or advertisement relating to such unfair trade practice shall be disclosed, issued or published as the case may be in such manner as may be specified in the order.<sup>196</sup> This power of the commission is wide enough to include affirmative disclosure as well as corrective Advertising<sup>197</sup>. Thus the MRTP commission will be within the confines of its right if it believes that mere cease and desist order or consent order will not dissipate the lingering effect of false or deceptive advertisement and will require the advertisers to issue corrective advertisement or have affirmative disclosure in future advertisements and how much he shall spend on such advertisement is for the commission to determine.

Second important challenge posed by Roseden's observations is that the corrective advertising order do not satisfy constitutionally necessary substantive pre requisites .He opines that the residual effect which through corrective advertising is attempted to erase, is based simply on conjectures and constitutionally protected right cannot be taken away on mere conjecture. He also questions the present FTC approach to order

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196. Section 36-D (c).

197. Corrective advertisement may be compared to, and is variant of affirmative disclosure, yet it differs in certain important respects. Traditionally, affirmative disclosures have been required only where the failure to reveal certain facts in current advertisements might actively mislead the consumer where as corrective advertising is a remedy designed to counteract abuses brought about through past false advertisement. See Note; Corrective Advertising -- The New Response to Consumer Deception 72 Col. L Rev. 415, 419.

respondent to issue corrective advertisement for all products alike. These observation of Roseden holds good under the present Indian scheme of laws also. The residual effect which corrective advertisement has to rub off must be proved one and not based on surmises. similarly MRTP commission cannot evolve a general rule applicable to all and sundry but has to examine the facts and peculiarities of each case. The approach of FTC to issue corrective advertisement for one year and spend 25% of the advertising expenditure for all products alike may in certain situations fail to serve the purpose or may be more than demanded by the situation. So ~~the~~ duration and the amount to be spent must be kept <sup>and</sup> open dependent upon the circumstances of the case.

# ***Chapter VII***

## **POWERS OF THE CONSUMER FOR A VIS-A-VIS UNFAIR TRADE PRACTICES**



The powers which the District consumer forum can exercise are enumerated in section 14 of the CP Act. Similar powers can be exercised by the State Commissions and National Commission by virtue of sections 18 and 22 respectively. These powers are :

- a) to remove the defect pointed out by the appropriate laboratory from the goods in question;
- b) to replace the goods with new goods of similar description which shall be free from any defect;
- c) to return to the complainant the price, or , as the case may be, the charges paid by the complainant;
- d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party;
- e) to remove the defects or deficiencies in the services in question;
- f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;
- g) not to offer the hazardous goods for sale;
- h) to withdraw the hazardous goods from being offered for sale;
- i) to provide adequate cost to parties.

The above mentioned powers can be exercised by the Redressal Agencies only when after conducting the proceedings under section 13, they are satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services is proved.

Section 14, it is submitted, is not properly drafted. It says that the Redressal Agencies can exercise powers only when

they are satisfied that the goods suffer from any of the defects or allegations made in the complaint against the services are proved. However, complaint as defined under section 2(c) can lie not only against "defects" or "deficiencies" but also against unfair or restrictive trade practices, excessive price charging and goods hazardous to life. It is therefore, suggested that section 14 be recast to provide "if after the proceedings conducted under section 13, the District forum is satisfied that any of the allegations contained in the complaint are proved".

The powers enumerated in section 14 are not in comports with section 2(c) which defines complaint. Section 2(c)(iv) runs as under:

A trader has charged for the goods mentioned in the complaint, a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods.

The Redressal Agencies do not possess power to order return of excess price charged by the trader in violation of the price fixed by or under any law for the time being in force or displayed on the goods or its package. Fettered by this legislative lapse, the MP State Commission in *Bhargav Auto & Electric Stores v. Lajjaram Tiwari*<sup>1</sup>, observed:

It cannot be said that section 14 empowers the District Forum to grant any relief in case of charging of excess price by a trader. This may be a legislative lacuna or a loop-hole but, it is not for us to plug it or to ignore it. We therefore, hold that no relief can be

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1. 1(1994) CPJ 455.

granted by a District Forum in the matter of complaints regarding charging of excess price<sup>2</sup>.

It is suggested that section 14 be amended to incorporate a clause empowering the District Forum to order return of excess of any price charged. The clause may run as follows:

To return the consumer price charged in excess of the price fixed by or under the law for the time being in force or displayed on the goods or its package.

The National Commission has taken a stand that the reliefs enumerated in section 14 are exhaustive and not illustrative. In other words consumer fora are bound to grant only those reliefs as are mentioned in section 14<sup>3</sup>. However, the National Commission itself did not stick to its own

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2. Id at 458. On the other hand The National Commission in *Bharat Tractors v. Shri Ram Chandra Pandey*, F.A. No 1 of 1989 order dated May, 17, 1989 did not interfere with the State Commission's order requiring the respondent to return excess amount. D. N. Saraf opines that although this power is not mentioned expressly in section 14, this is an implied power which consumer fora must exercise. See D. N. Saraf, *Law of Consumer Protection in India* (1st. ed 1990) at 167.

3. See for instance *Devashish Mitra v. The Managing Director Lakshmi Varsha company & Anr* 1 (1992) CPJ 30; *Anil Kumar Pareek v. Municipal Board Shahpura* 11 (1991) CPJ 250. In both these cases complainant claimed that fraud has been perpetrated on him by the respondent. But the apex Commission declined to grant relief in view of section 14; see also *Rajasthan state industrial Development & investment corp. v. premier paints* 11 (1992) CPJ 599, *Bhalcheruvn Lay Out Flat Owner's Association v. Visakha Patnam Urban Development Authority* (1992) 1 CPJ 46; *Manager Milk Chilling Centre v. Mehbonagar Citizens Council* (1991) CPJ 219; *A P State Electricity Board v. A P State Electricity Consumer Association* 1 (1992) CPJ 148; *Consumer Protection Council v. Indian Railways* 1 (1992) CPJ 120; *Consumer unity & protection Centre v. Laxmichand Bhaji ltd.* o p No 8 of 1988, *Kongara Ananth Ram v. Telecom District Engineer* (1992) 1 CTJ 124; *Madras Meteropolitan Water Supply and Sewerage Board v. Consumer's Council of India* (1993) 1 CTJ 17; *Union of India v. Chairman, Madras P.C Association* (1993) 1 Comp. LJ 213.

stand<sup>4</sup> but granted relief which the apex Commission considered necessary in the interest of the justice.

It is suggested that a residuary clause be incorporated in section 14 which may be as follows:

To grant such reliefs as the District Forum deems fit in the interest of justice.

#### POWER TO REMOVE DEFECTS OR DEFICIENCIES

The Consumer fora are empowered to remove defects in goods<sup>5</sup> and if it is not possible then to replace goods<sup>6</sup>. If replacement is also not possible then to return the price of goods<sup>7</sup>. Similarly in case of services, consumer fora can either order to remove deficiency<sup>8</sup> or return the charges paid

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4. In *Archant Converters v. United India Insurance Co. Ltd.* 11 (1991) CPJ 246. The National Commission directed that the arbitrator would conclude the deliberations on the case and make his award within a period of six months. In *Hindustan Motors Ltd v. Suri Fashions Pvt. Ltd.* 1 (1991) CPJ 249 and in *Jagam Lal Agarwal v. Hindustan Motors Ltd.* (F A No 32 of 1990), the National Commission upheld the direction of the State Commission to provide the complainant a guarantee for a further period of one year in respect of a defective part of the car. In *M K Gupta v. Lucknow Development Authority* (1992) CPJ 66 The apex Commission directed the respondent to hand over the possession of the house to the complainant on "as is where is" condition before a given date. In *Bangalore Development Authority v. Savitri Sanghi* (F A. No 72 of 1990), the respondent was directed to execute a necessary lease-cum sale document and deposit the same together with the amount of stamp duty. In *Mrs Mable Roosevelt v. State of Kerala*, the apex Commission gave a direction to provide a provision of employment to the complainant or her children (F A No 72 of 1990).

5. Section 14 (a) & (e)

6. Section 14 (b)

7. Section 14 (c)

8. Section 14 (e)

by the the consumer<sup>9</sup>. The expressions "defect" and deficiency have been defined in the CP Act. The definition of defect goes as under:

defect means any fault imperfection or shortcoming in the quality, quantity, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied or as is claimed by the traders in any manner what so ever in relation to any goods<sup>10</sup>.

and definition of deficiency is :

deficiency means any fault imperfection, shortcoming or inadequacy in the quality , nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service<sup>11</sup>.

A plain look at the above mentioned definitions would indicate that the legislature intended to give the widest amplitude to the words "defect" and deficiency. What first meets the eye is that these definitions do not seem to confine the words "defect" and "deficiency" within any narrow or technical definition. Indeed, these are deliberately couched in the widest horizon of these being any kind of fault, imperfection or shortcoming. The legislature in employing these words was patently casting its net so wide as to bring within its import every deviation from the requirements spelt out in the latter part of the definitions<sup>12</sup>.

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9. Section 14 (c)

10. Section 2 (f)

11. Section 2 (g)

12 *J.D Sharma v. M/s Maruti Udyog ltd & ors* (1991) 1 CPR 436 at 442. See also *Anup Kumar Kailash V.S.M.Kanwar and ors* (1992) 1 CPR 410; *Chaman Singh Faujdar & Anr v. The Green Remedies ltd & Anr* 11 (1992) CPJ 915.

What is then of equal importance are two aspects regarding the quality, quantity, potency or standard in case of goods and quality, nature and manner of performance in case of services. First, this may either be required to be maintained by any law or rules for the time being in force. Second, where there is no such statutory requirement, then in alternative these requirements are to be tested on the anvil of what is claimed by the trader in any manner what so ever. This would obviously mean that such claim may be either express or implied. To put it in technical terms, the definition of the defect and deficiency with regard to the standard required to be maintained by law or in alternative as claimed by the trader expressly or impliedly in any manner what so ever are to be read disjunctively. The employment of the word "or" here is clearly disjunctive and not conjunctive<sup>13</sup>.

There are legislations which do prescribe the standard which the trader of the goods<sup>14</sup> or provider of services<sup>15</sup> must maintain. Naturally if the standard so prescribed is not maintained

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13. Ibid.

14. See for instance Drugs and Cosmetics Act, 1940. Standards of Weights and Measures Act, 1976; the Standards of weights and Measures (packaged commodities) Rules, 1977, the Standard of Weights and Measures (Enforcement) Act, 1985. The Insecticide Act, the Prevention of Food Adulteration Act, 1955. Sale of Goods Act, 1930.

15. For services there are special laws for instance, Insurance Act, Electricity Act, Indian post office Act, Indian Railways Act, etc. However consumer fora can exercise jurisdiction over these services only when the same are not expressly barred and are not free or under a contract of personal service.

then the CP Act can be invoked. In its wider sense, any law for the time in force will also include any custom or practice having the force of law. Whether the rules of law of torts regarding the standard of care to be taken by a person in respect of goods will also fall in to this category is not clear<sup>16</sup>.

The discretion to order, to remove defect or replace goods with new goods of similar description or to return the price, lies in the consumer fora. From the decisions of the National Commission it appears<sup>17</sup> that the replacement or refund for the price is possible only when goods suffer from the manufacturing defect. In *M/s TA TA Engineering & locomotive co Ltd & Anr v. M. Moosa*<sup>18</sup> the National Commission held:

It is surprising to know that no manufacturing defect has been pointed out in the vehicle ..... Even if there are numerous defects which can be rectified, it will be very hard on the manufacturers to replace the vehicle or refund its price merely because some defect (not manufacturing defect appears which can be rectified or defective part can be replaced<sup>19</sup>.

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16. D.N Saraf, law of Consumer Protection in India (1,ed 1990) at 139.

17. *Abhaya Kumar Panda v. M/s Bajaj Auto Limited* 1 (1992) CPJ 88. The National Commission ordered replacement of auto trailer when it found that the vehicle had major manufacturing structural defect. See also *Mahindra & Mahindra Ltd. v.B.G Thakur Desia* 11 (1993) CPJ 22.

18. (1994) 3 CPR 395.

19. Id at 397.

To say that the goods must have only manufacturing defect so that its replacement can be ordered, it is submitted, is not correct. Leaving aside the manufacturing defect, some times it is possible that the goods may have numerous defects which even if rectified, will not make goods new but reconditioned. In such situation order to remove defects but not the replacement, will do injustice to the consumer. The pragmatic observation of Rougier J in *Bernstein v Pamson Motors (Golden Green) Ltd*<sup>20</sup> merits mention

the relevant factor is whether the defect is of such a nature that it is in fact capable of being satisfactorily repaired so as to produce a result as good as new. There could come stage when an army of minor, unconnected defects would be evidence of such bad workmanship in the manufacture, or on the assembly line generally as to amount in toto breach of the condition of merchantability.

Another vexed question is whether non supply of goods amounts to "defect" or deficiency as defined in the CP Act. Under law of contract, non supply of goods amounts to breach of contract and remedy is either to sue for specific performance of contract or claim for damages. Since breach of contract is not a consumer dispute<sup>21</sup>, so no question of specific performance arises. It is pertinent to mention here that the authors have expressed divergent views on the absence of provision of specific performance of the contract in the CP Act. One view is that the omission of provision for specific performance of the contract is

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20. 1987 (2) All ER 220.

21. See *V. Hydru v. Amal Banerjee* (1992) 2 CPR 243; *M/s Tilottama Security Printers v. Board Of Secondry Education, Orissa and Anr* (1992) 2 CPR 328.



a lapse on the part of the legislature<sup>22</sup>. Other view is that the Act comes in action only after the goods have been supplied. It does not deal with any thing before the goods are supplied. Hence the question of specific performance does not arise<sup>23</sup>. Leaving aside this debate on the issue of specific performance, the National Commission in a number of cases<sup>24</sup> held that the non supply of goods can in no case amount to "defect" as defined in the Act and the contention that it amounts to deficiency was also rejected by the apex Commission by holding that non supply in fact is a case of sale of goods simpliciter and it does neither involve rendering of any service for consideration nor is it a case of hiring of service.

However, the Supreme Court in *Om Prakash v. Assistant Engineer, Haryana Agro Industries Corporation*<sup>25</sup> overruled the opinion of the National Commission and held:

In view of section 2(1) (c) (iii), complaint will include any allegation in writing made by a complainant that the service mentioned in the complaint suffer from deficiency in any respect. As such, even if the complaint regarding the delayed supply of the tractor, in the fact and circumstances of the present case, may not be covered by

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22. S. N. Singh Consumer protection legislation: A Critique JILI (1987) 380 at 38

23. S. S. H. Azmi Sale of Goods and Consumer Protection in India (1st ed. 1992) at 248.

24. See *M/s Maruti Udyog Ltd. v. Mrs Bhuvana Viswanathen & ors* 11 (1993) CPJ 172; *Visarbha Brick Manufacturers Association & ors v. Coal India Ltd & NS* 1 (1993) CPJ 248; *Dr. Bhavna Chinvbhai v. Cargo Motors* 11(1992) CPJ 760 (GUJ).

25. (1994) 2 CTJ 289 (Supreme court) CP.

section 2 (1) (c) (1), it shall amount to deficiency in service by the respondent. The definitions of deficiency and service given under sections 2 (1) (g) and (0) will cover the action of the respondent, i.e. intentionally delaying the supply of the tractor. In the facts and circumstances of the case there should not be any difficulty in holding that the service which was made available to the appellant by the respondent, suffered from deficiency<sup>26</sup>.

The above opinion was reiterated by the supreme court in *Mohinder Pratap Das v. Modern Automobiles and Anr*<sup>27</sup> and *Punjab water supply and sewage Board v. Udaipur cement works and Anr*<sup>28</sup>.

It is submitted that the opinion enunciated in the Om Prakash (supra) is without gain say in favour of the consumers who are forced to pay more than the agreed amount, nevertheless it is without the mandate of law. The non supply is simply a breach of contract. The sale of goods can by no amount of interpretational casuistry be called as rendering of service<sup>29</sup>.

Nevertheless, the issue of non supply or delayed supply of goods shall be covered by the amended definition of unfair trade practice which includes any "Unfair method or unfair or deceptive practice" adopted by a trader vis-a- vis the consumer. This legal position was realised and accepted by the Supreme Court in the

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26. Id at 293.

27. (1995) 3 CTJ 782 (Supreme Court) CP.

28. (1995) 3 CTJ 993 (Supreme Court) CP.

29. See for contrary opinion D N Saraf, xxviii ASIL (1992) 54.

Om prakash's case<sup>30</sup>. However, the amendment was made in the MRTP Act<sup>31</sup> by Act No 58 of 1991 with effect from 29.9.1991 and the contract of the sale of tractor in Om Prakash's case was made on 12.12.1990. This was the main reason why the Supreme Court could not give benefit of this amended definition to the appellant. But the interesting point is that in the latter two cases<sup>32</sup>, Supreme court followed the reasoning of Om Prakash's case and did not even mention the amended definition of unfair trade practice. There fore, the reasoning is erroneous.

### POWER TO AWARD COMPENSATION

At the time of passing of the CP Act, 1986, consumer fora could grant four reliefs which were incorporated in Section 14. First two reliefs were related to goods and these were (a) to remove defect pointed out by the appropriate Laboratory and (b) to replace the goods with new goods. Third relief was related to both, goods as well as services which was; to return price or charges as the case may be to the Consumer. The fourth relief contained in clause (d) was as under:

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30.The Supreme Court laid down; but after the introduction of the amendment, which provides that the unfair or deceptive practice adopted by a trader vis-a-vis the Consumer, the conduct and practice intentionally adopted by the respondent, in not making delivery of the tractor to the appellant, shall certainly be deemed to be unfair practice. Id at 292.

31.Before the Consumer protection (Amendment) Act, 1993, the unfair trade practices definition in CP Act was the same as incorporated in section 36A of the MRTP Act by virtue of section 2(r) of the Act.

32. Supra note 26&27.

to pay such amount as may be awarded by it as compensation to the Consumer for any loss or injury suffered by the Consumer due to the negligence of the opposite party.

Since there was no relief available to the consumer for deficient service, so section 14 (d) was interpreted in such a way as to create an impression that the compensation is the relief available only in case service rendered is found deficient<sup>33</sup> and not where goods sold are defective<sup>34</sup>. However, this is not correct. The correct interpretation is that if any one of the allegations mentioned in the complaint (as defined under section 2 (1) (c)) is proved and it is also established that the complainant suffered loss or injury due to the negligence of the opposite party, compensation can be granted and it is immaterial whether the goods or services are in question.

In order to make position more clear and to provide, in addition to compensation, other reliefs for deficient service, section 14 was amended by the Consumer Protection (Amendment)

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33. In *Vaghri Gopalbahi v. Parmar Nevasen Balabhai & Anr* (1993) ICPR 526, it was held that a Consumer was to prove two things for getting compensation under section 14 (1) (d) of COPRA viz, that he hired the services of opp. party for consideration and that he has suffered injury due to negligence of the opp. party.

34. See B. Sundaramoorthy. A suggestion for Amendment of the consumer protection Act, 1986 (1993) 2 CPR 289, after citing cases, the learned author says that the word negligence has been wrongly used in section 14 (1)(d) in place of word deficiency in service. Which in the opinion of the author is fortified by the National Commission's decisions.

Act, 1993<sup>35</sup>. The compensation provision is thus general one and is available to Consumer when he proves any one of the allegations in complaint which occasions loss to him and that loss is caused due to negligence of the opposite party.

The National Commission took a stand that for section 14 (d) two conditions must be satisfied- (1) The Consumer must have suffered loss or injury (2) That the injury or loss must have been caused due to the negligence of the opposite party<sup>36</sup>. Explaining the scope of section 14 (d), the Supreme Court in *Consumer unity and Trust Society Jaipur v. The Chairman and Managing Director, Bank of Baroda, Calcutta, and Anr*<sup>37</sup> held that each of these expressions used in the sub section are of wide connotation and are fully comprehended both in common and legal sense. Negligence is absence of reasonable or prudent care which a reasonable person is expected to observe in a given set of circumstances. But the negligence for which a Consumer can claim to be compensated under this sub section must cause some loss or injury to

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35. Not only original four reliefs were retained but five more reliefs were incorporated. These are (e) to remove the defects or deficiencies in the service in question (f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them, (g) not to offer the hazardous goods for sale (h) to withdraw the hazardous goods from being offered for sale, (i) to provide for adequate cost to parties.

36. See for instance *General Manager, South Eastern Railway v. Anand Prasad Sinha* (1989) 3 Comp. LJ 269; *Commercial Office Telecom v. Bihar State Warehousing Corp.*, (1991)1 CPJ 42; *Indian Air lines v. Rajesh Kumar Upadhyay* (1991)1 CPJ 206; *Consumer unity & Trust Society v. Bank of Baroda* (1992)1 CPJ 18; *Western India State Motors v. Sobhag Mal Meena* (1992)1 CPJ 44.

37. (1995) 3 CTJ 97 (Supreme Court) CP.

him. Loss is a generic term. It signifies some detriment or deprivation or damage. Injury means any damage or wrong. It means invasion of legally protected interest of another. Thus, the provisions of section 14 (1) (d) are attracted if the person from whom damages are claimed, is found to have acted negligently and such negligence must result in some loss to the person claiming damages. In other words, loss or injury, if any must flow from negligence. Mere loss or injury without negligence is not contemplated by this section<sup>38</sup>.

When Legislature enacted CP Act, some novel and revolutionary concepts were introduced in the Act and thus made it a unique piece of legislation free from the traditional doctrines. However, provision for compensation is still made dependent on the negligence of the opposite party. It is not the factum of defect alone which will entitle the Consumer to compensation, the basis for claiming damages is the negligence of the opposite party.

In England section 2 of the Consumer Protection Act, 1987 has incorporated the principle of strict liability and has done away with the traditional negligence based liability<sup>39</sup>. The

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38. Id at 99.

39. See 2 provides: (1) Subject to the following provisions of this part, where any damage is caused wholly or partly by defect in a product, every person to whom subsection (2) below applies shall be liable for the damage. (2) This subsection applies to (a) the producer of the product; (b) any person who by putting his name on the product or using trade mark or other distinguishing mark in relation to the product, has held himself out to be that producer of the product; c) any person who has imported the product into a member state from business of his, to supply to another.

principle of strict liability has also taken firm roots in the industrially advanced countries. Due to futility and difficulty of proving negligence in most of the cases, the principle has been accepted that instead of fault of the person (manufacturer, distributor, seller or provider of services) it would serve the ends of justice if the fault of the product is demonstrated and it is shown that the damage or loss was caused due to the fault of the product<sup>40</sup>. It is therefore, suggested that the word negligence be dropped from clause (d) and when the complainant proves that a product is defective or service is deficient, and he suffered damage due to no fault of his, he should be entitled to compensation.

The CP Act and the rules framed thereunder are silent on the yardstick which should be applied while awarding compensation as the principles for awarding compensation under law of torts are different from the law of contract. Not only this alone, the scope is also different. While resolving this uncertainty the National Commission in *Col Bheem Singh v. National Insurance Company*<sup>41</sup> held that the liability to pay compensation under section 14 (1) (d) is in the nature of liability in torts and not under contract.

Another welcome observation of the National Commission is that where no compensation is claimed, the Consumer fora on its

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40. DN Saraf, Law of Consumer protection in India (1st ed 1990) at 165.

41. 1 (1992) CPJ 205 See also *Krishnaswamy v. The Manager Southern Region*, AIR India Ors III (1992) CPJ 376.

own should quantify the compensation and where it is impracticable to adduce evidence regarding the actual loss, Consumer courts, should on their own assess it<sup>42</sup>.

### **POWER TO ENFORCE ORDERS**

Leaving aside the debate of the jurists that it is because a rule is regarded as obligatory that a measure of coercion may be attached to it, it is not obligatory because there is coercion<sup>43</sup>, the truth of the matter is that in some areas there will be flagrant violation of rules unless they are backed by some effective sanctions<sup>44</sup>. Alive to this ground reality, legislature do provide penal provisions whenever people are enjoined to do or not to do any thing through law. Conforming to this traditional legal policy<sup>45</sup>, the CP Act, 1986 in order to seek compliance with the orders of the Consumer Disputes Redressal Agencies, provide sections 25 and 26 for the enforcement of orders and imposition of penalties on the defaulter in the event of violation of those

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42. *Smt Kalash Kumari v. prof. Shankar and Co* 111 (1991) CPC 302, *Rajasthan state Electricity Board v. Roshan Lal Jain* 11 (1992) CPJ 626 *H. SEB Panchkula & ors. v. Prithi Singh* Ap Nos 346 & 352 of 1992 decided on 15th December, 1992 and *Mukand Lal Gabs v. Telecom District Manager of Karnal* 11 (1993) CP 5 935.

43. A L Goodhart, English law and the Moral law at 17.

44. A Socio-legal study undertaken to determine why people (in this case tax- payers) obeyed the law found that "the threat of sanction can deter people from violating the law, perhaps an important part by inducing a moralistic attitude towards compliance". Schwartz and Orleans (1967) 34 U.Chi. L.R 274 at 300.

45. *In H S E B v. Pirthi Singh* 11 (1993) CPJ 715 at 719 it is stated that without the sanction of section 27 perhaps the Consumer jurisdiction would only be a paper-tiger lacking teeth altogether.



orders'<sup>46</sup>. Section 25 provides that every order made by CDRA's may be enforced by them in the same manner as if it were a decrees or an order made by a court in a pending suit. However, in the event of their inability to execute their orders, it shall be lawful for the CDRA's to send such orders for their execution to the court, within the local limits of whose jurisdiction an individual voluntarily resides or personally works for gain or a business organisation is situated against whom any order has been passed respectively. Section 27 provides that where a trader or a person against whom a complaint is made or that the complainant fails or omits to comply with any order made by the CDRA's, the defaulter shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years or with a fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees or with both. However, CDRA's, have been empowered to impose a sentence of imprisonment or fine less than the prescribed, if circumstances so require.

Commenting on the scope of sections 25 and 27, Haryana state Commission in *H S E B v. Pirthi Singh*<sup>47</sup> held:

Section 25 is an enabling provision conferring a discretion on the redressal agencies to enforce their orders through the civil court in the event of their inability to execute these orders themselves<sup>48</sup>.

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46. *M/s Rajani Gas Company v. Jawalekar*, 1 (1992) CPJ 786.

47. *Supra* note 3

48. *Id* at 719

Section 27 does not create an offence *stricto sensu*, but is only a methodology of stringent penalty on pain of which the orders of redressal agencies are to be complied with expeditiously. It appears from the tenor of the section that the obligation of compliance with the orders of the redressal agencies lies immediately and squarely on the traders or a person against whom the same has been passed. The intent of the section is plain that the moment he steps in this mandatory duty, he automatically invites the rigour of the penalty under this provision<sup>49</sup>.

Sections 25 and 27 have been thus incorporated to achieve common goal ie the speedy enforcement of the orders of the CDRA's<sup>50</sup>. While section 25 visualise the enforcement of such orders by a civil process as if they were a decree or order made by a court of law in a suit proceeding therein,<sup>51</sup> Section 27 confers a quasi criminal sanction<sup>52</sup> for their enforcement by way of punishment with imprisonment or imposition of monetary penalties<sup>53</sup>. This necessitates the correlating of sections 25 and 27 of the Act<sup>54</sup> and have to be construed together<sup>55</sup>.

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49. Ibid

50. *Mrs Suman Late v. M/s Anand Construction Delhi pvt Ltd.* (1993)1 CPR 352.

51. *M/s Aurora Sales (India) v. M/s Transport Corporation of India ltd and Ors* (1992) 2 CPR 387.

52. However, Delhi State Commission In *M/s Vikmans & Anr v. Rakesh Kumar* (1992) 1 CPR 287 and *S V Rao v. By Ford leasing ltd.* (1994) 3 CPR 512 held that proceedings under section 27 are criminal in nature.

53. *Kohinoor Carpets, Panipat & Ors, v. Rajander Arora*, 11 (1991) CPR 429.

54. *Supra* note 44 at 354.

55. *H S E B & Ors v Pirthi Singh*, 11 (1993) CPJ 715.

The question which was debated before the Consumer fora was whether it is necessary that the decree holder must satisfy first section 25 and only then he can invoke section 27 or it entirely depends upon the decree holder whether to take help of section 25 or 27.

The Delhi state Commission in *Om Prakash Bhatia v. M/s Deepu chits pvt. ltd. and ors*<sup>56</sup> held that it is evident that sections 25 & 27 are in the nature of execution proceedings and constitute independent remedies. The decree holder can avail of the other remedy, if by availing of one remedy, he failed to recover the amount<sup>57</sup>. On the other hand, the M P State Commission in *Dr. K. C Barolia v. Sipani Automobiles*<sup>58</sup> held that the spirit of the Act expects that first, proceedings under section 25 be followed and in case executant fails to execute orders or judgment debtor fails or omits to comply with the orders then section 27 is to be invoked<sup>59</sup>.

Haryana State Commission in *H S E B v. Pirthi Singh*<sup>60</sup> made full scanning of sections 25 and 27 and observed that an incisive and indepth reading of section 25 would make it manifest that the

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56. 1 (1993) CPJ 567.

57. Id at 569.

58. (1994) 3 CPR 312.

59. Id at 313.

60. Supra note 45 at 719.

primary duty laid down on the redressal agencies is to execute their substantive orders themselves and not to shift that burden on the civil courts. This is manifest from the meaningful words."It shall be lawful for the District forum, the state Commission or the National Commission to send in the event of its inability to execute such order to the court within the local limits of whose jurisdiction". This is made clear by the use of the words, "in the event of its inability to execute it", which implies that the primary duty to execute the orders is that of the CDRA's themselves and in the event of their inability to do so, it is lawful to make resort to the civil court for execution<sup>61</sup>.

Furthermore, section 25 gives discretion to the redressal agencies by employing the word "may". It is not that this provision says that such orders can only be enforced as decrees or orders or that this is the only methodology for enforcement. The employment of word "may" is significant and it is well settled that unless indicated otherwise it has to be so construed. Patently there is nothing herein to read the word "may" as "shall"<sup>62</sup>. Had it been otherwise, then parliament would have employed categoric terminology that the order of the redressal

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61. Ibid.

62. Ibid.

agencies can be only enforced as civil decrees and not otherwise<sup>63</sup>.

It is submitted, as rightly pointed out by the Haryan State Commission that there is nothing contained in sections 25 and 27 which limits the choice of the decree holder to have first resort to section 25. Section 25 clearly provides that in case Consumer forum is not able to execute orders only then matter may be referred to civil court. The Consumer fora can themselves executed their orders with the help of section 51 of the Civil Procedure Code read with Order xxi rules 39 and 40. It is only when Consumer fora are unable to execute the orders then it is permissible to refer decree to the civil court for execution. If orders of the Consumer fora as a routine are converted in the decrees and are enforced through ordinary civil courts, then the very purpose of the Act to provide cheap and speedy remedy will be defeated which is the primary object of the Act. In the words of the Supreme Court in *Lucknow Development Authority v. M Gupta*<sup>64</sup> that the " Law in fact meets the long necessity of protecting the common man from such wrongs for which the remedy

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63. However, in *Amrit Lal v. M/s Instant Growth Fund pvt ltd and Ors* (1994) 2 CPR 482, it was held that the legislature has provided two different remedies to the decree holder to recover the decretal amount, one through the execution of the decree as is done by a decree holder in a civil case and the other by initiating the criminal proceedings under section 27. In other words discretion is of the decree holder whether he comes before Consumer forum under section 25 or 27. Id at 485.

64. 111 (1993) CPJ 17.

under ordinary law for various reasons has become illusory ", so it will not serve Consumer interest to convert the "order" into "decrees" and relegate the decree holder to ordinary civil court for its execution. The holding of the MP state Commission In Dr. K C Barolia (supra) that section 25 must be first satisfied and only when desired results are not achieved, help of section 27 may be taken, It is submitted, is not correct. Basically in sections 25 and 27 two independent remedies have been incorporated by the legislature for executing the orders of the forum. If the decree holder approaches the Consumer forum under section 27, the forum will not be right to direct him to exhaust first section 25 and only then come under section 27. Sections 25 and 27 therefore give two optional remedies to the decree holder and it lies entirely in his discretion what option he is going to exercise. The Consumer forum neither have any right nor discretion to impose its own opinion on decree holder on the issue of mode of execution of orders. This was realised by the Delhi State Commission in *Amrit lal v. M/s Instant Growth Fund Pvt. Ltd. and ors*<sup>65</sup>, when it was held that the legislature has provided two different remedies to the decree holder to recover the decretal amount. One through the execution of the decree as is done by a decree holder in a civil case and the other by initiating the criminal proceedings under section 27.

Section 27 arms the Consumer fora with the power to inflict punishment or impose fine on the judgment debtor in case of his

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65. Supra note 63.

default. However, rules have not been framed for the exercise of this power by the Consumer fora. Realising this legislative lapse, Justice Balakrishna Eradi observes:

Yet another important matter in respect of which the existing provisions contained in the Act require to be amplified is that while section 27 of the CP Act expressly empowers redressal forum to impose punishment of imprisonment against a person who fails or refuses to comply with its order, it is not expressly stipulated that an order of fine or a warrant of arrest issued by a forum constituted under the Act is to be deemed to be an order or warrant issued by a competent criminal court and should be executed and enforced as such by the police authorities. In order to obviate difficulties and doubts concerning the matter, it is necessary that an express provision in the above regard should be incorporated in section 27 of the Act<sup>66</sup>.

In the absence of rules regulating exercise of power under section 27, Consumer fora came up not only with the conflicting observations but issued orders which did not befit to the criminal jurisprudence. For instance in *Union of India v. Chairman Madras Provincial Consumer Association*<sup>67</sup>, the District forum made the following observation which was upheld by the state Commission also.

In default of compliance of the above order, we punish and sentence Mr R Narasimhan, the general Manager, Southern Railway, one year simple imprisonment under section 27 of the Consumer protection Act. 1986<sup>68</sup>.

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66. Address of Hon'ble justice v. Balakrishna Eradi to National convention of Presidents And Members of the State Consumer Disputes Redressal Commission New Delhi 24 January 1994.

67. 11 (1992) CPJ 524.

68. Id at 526 see also for similar composite orders; *JK Synthetic Ltd v. Smt Anita Bhargava* (1996)1 CPR 287; *Punjab & Sind Bank v. Manpreet Singh Sood* (1994) 2 CPR 627.

The National Commission in no uncertain terms expressed its displeasure as under:

We have to express our strong disapproval of the procedure adopted by the district forum in proceedings to pass an order of punishment and sentence of imprisonment on the general Manager, mentioning him by name, even at the stage of grant for relief on the complaint petition<sup>69</sup>.

The question arises that in absence of the rules for exercising power under section 27, can relevant provisions of the Criminal Procedure Code 1973 be invoked? The National Commission without answering this pointed question laid down in *union of India v. Chairman Provincial Consumer Association*<sup>70</sup> that if an action is

taken under section 27 of the Act, natural justice requires that the person sought to be proceeded against shall be issued notice and his explanation shall be heard before any conclusion is reached that an order of punishment and imposition of any sentence is called for.

The Delhi state Commission in *S.V. Rao v. Byford leasing ltd*<sup>71</sup> made a categoric observation by holding that the provisions

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69. Id at 527 See also *Union of India v. K Thiruvengadam*. Consumer cases Reporter Vol 3 April 1993 (part iv ) at 255.

70. Ibid see also *Signet Corporation v. Commissioner MCD and Ors* (1995) 3 CPR 261. It cannot be disputed that it is a necessary condition precedent under section 27 that before a person is visited with punishment he should be afforded a fair and reasonable opportunity of showing cause against it Id at 263.

71. (1994) 3 CPR 512.



of Code of Criminal Procedure are not applicable to proceedings under section 27 of the Act. In order to reach this conclusion, the Commission took the help of the Supreme Court's opinion in *Lucknow Development Authority v. M K Gupta*<sup>72</sup> in which it was laid down that since CP Act is a social welfare legislation, its provisions should be construed liberally and in favour of the Consumer so that the purpose and object of the Act is achieved. The Commission thus held that no such procedure should be adopted by which trial is likely to be protracted and becomes cumbersome as it will defeat the very purpose of the Act to provide speedy justice to the Consumers<sup>73</sup>. The Commission also took the help of the National Commission's opinion in *N K Modi v. M/s Fair Engineers (pvt) ltd*<sup>74</sup> in which it was stated that though the Consumer fora are vested with the function of adjudicating disputes concerning certain categories of the grievances of Consumers, they are to function in an informal manner conforming only to the principles of natural justice and free from the shackles and trappings of courts.

The Delhi state Commission provided the guidelines in *M/s vikman v. Rakesh Kumer*<sup>75</sup> which are as under:

It is well settled that if a person is being tried for an offence, which prescribes a sentence of imprisonment or, fine he should be given a reasonable opportunity to

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72. Supra note 54.

73. Supra note 61 at 515.

74. 1(1993) CPJ 53 (NC).

75. 1(1992) CPJ 386.

defend himself. He cannot be sentenced to undergo imprisonment and pay fine without affording such an opportunity. It is also well settled that an accused cannot be convicted in absentia. Therefore, it is the duty of forum to secure the presence of appellant before an action could be taken against him. If his presence could not be secured by summons. It should have been secured by issuing bailable warrants. If after service of the warrants he absented himself, non bailable warrants could be issued against him<sup>76</sup>.

The question arises: are the orders passed by the District Consumer fora under sections 25 and 27 appealable to state Commission. It has been argued<sup>77</sup> that the appeal is a matter of right for the aggrieved person. Since section 15 contains a general provision for appeal against any order of the District forum, it can be filed against all orders, whether interim<sup>78</sup> or final. Whether dealing with jurisdiction of the forum or some other aspect<sup>79</sup>.

On the other hand Haryana State Commission in *Kohinoor Carpets Panipat & ors v. Rajinder Arora*<sup>80</sup> held that section 15 refers to "an order" made by the District forum and not of "any

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76. Id at 387 See for similar guidelines General Manager (Tele phone) and Anr.v. Smt: Champalaxmi Krushnachandra Deva (1993) 1 CPR 121; Secretary, Gujarat, Secondary Education Board & Anr v. Daksha Ishwarlal Dhorajuya, (1993) CPR 203.

77. S N Singh; Appellate and Revisional Jurisdiction under Consumer Protection Act. Corporate Law Advisor April 1992 at 148.

78. It needs mention here that there is no express provision under the CP Act providing grant of interim order.

79. Id at 194.

80. 11 (1991) CPJ 429.

or every order" made by it and that such an order had a contextual reference to the Preceding section 14 containing the findings of the District fourm on a complaint preferred before it under section 12. To construe "an order" as "any order" in section 15 when carried to logical lengths would lead to an obvious absurdity<sup>81</sup>. If that were to be so, then every order, whether interlocutory, interim or one merely giving an adjournment made by the District Fourm would come within the sweep of section 15. Thus according to the Commission where two interpretations of a statutory provision are possible, the one which could lead to absured or mischievous results have to be necessarily avoided. To read section 15 as laying down that any and every order of whatever nature passed by the District forum would become appealable there under appeared to be running patently against the basic canons of construction<sup>82</sup>.

Repelling the argument that the appeal can be filed as a matter of right the Commission said:

The right to appeal is a pure creature of the statute. There is no inherent or natural right to a first appeal. If parliament in its wisdom does not provide any appeal from an order, it cannot be created on the ground that such an order is onerous in nature. The best judge for the provision of the substantive right of appeal is the legislature and not the courts on any grounds of compassion, or sentiment<sup>83</sup>.

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81. Id at 433.

82. Id at 434.

83. Id at 436. See also *J.S kalra v. National Insurance Co ltd.* 1 (1993) CPJ 339 *M/s Agarwal Sales Corp. v. Jagdish Vyas* (1993) 1 CPR 70; *Raymond Synthetic ltd. v. Babulal Khenka* (1993)1 CPR 518 and *DP Mishra Telecom. District Engineer Ajmer & ors Rajesh Tondon* (1993) 1 CPJ 433.

It is submitted that the above opinion of the Haryana state Commission is correct and in consonance with the purpose and object of the Act to provide speedy and inexpensive justice to the Consumers. In India it is a horary adage that the real trouble of the litigant starts after he has obtained decree in his favour. The judgment debtor will naturally try very hard to put every hurdle on the way of execution of decree. So holding otherwise will give handle to the judgment debtor to abuse the process of law and will prolong the injustice perpetrated on decree holder.

Nevertheless, if there is really any miscarriage of justice, the judgment debtor can go to the superior forum for revision in order to rectify the error, if any. This fact was realised by the Gujarat<sup>84</sup> and Rajasthan State Commissions also<sup>85</sup>.

Section 27 provides punishment for non compliance of the order of the CDRA's by the trader or any other person. The

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84. See *General Manager (Telephone) and Anr v. Smt. Champalaxmi Krushnachandar Dave* (1993) 1 CPR 121 and *JE. Secretary Gujarat Secondary Education & Anr v. Daksha Ishwarlal Dhora-jya*. (1993) 1 CPR203.

85. It was stated: The State Commission possesses general power of revision. It can at any stage of its motion, if it is so desirous and certainly when illegality or irregularities resulting in injustice are brought to its notice, call for the records and examine them. The discretion in the exercise of revisional Jurisdiction should be exercised within the four corners of clause(b) of section 17. Section 17 (b) enables the State Commission to correct and when necessary, correct cases of errors of Jurisdiction committed by the District forum and the object behind it is to provide the means to an aggrieved party to obtain rectification of non appealable order in exceptional cases.(1993) ICPR 70 at 74 See also *CR Katoria v. Consumer Disputes Redressal District Forum, patiala and Ors* 11(1993) CPJ 805.

question arises that if a corporation or a company violates the order, who will be punished? There was a debate under the physical civil law whether company or corporation be liable for physical punishment? In *Narian Singh v. S Hardy Singh Harika*<sup>86</sup>, the Punjab High court held that the agent and others who act for a corporation and who knowingly violate or disobey an injunction against the corporation are punishable for contempt, even though the injunction is issued only against the corporation.

The above opinion of the Punjab High Court found express approval of the Supreme Court in *Aligarh Municipal Board and Others v. Ekka Tanga Mazdoor Union and Ors*<sup>87</sup>, when it was laid down that a command to a corporation is in fact command to those who are officially responsible for the conduct of its affairs. If they, after being apprised of the orders directed to the corporation, prevent compliance or fail to take appropriate action, within their power for the performance of the duty of obeying the orders, they and the corporate body are both guilty of disobedience and may be punished for contempt.

Fortified by the above opinions, the Delhi State Commission in *Amrit Lal v. M/s Instant Growth Fund Pvt. Ltd. and ors*<sup>88</sup> and *S. V Rao v. Byford leasing Ltd*<sup>89</sup> took the stand that the officers

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86. AIR 1958 Punj. 180.

87. AIR 1970 Sc 1767.

88. Supra note 54.

89. Supra note 61.

of the company will be punished in case they fail to carry out the orders of the CDRA's.

#### POWER TO PASS INTERIM ORDERS:

The CP Act, 1986 does not contain any express provision for granting injunction. Authors have expressed divergent views on this point. One view is that since the Act was passed in undue haste, that is why many significant aspects have not been covered or foreseen. One among them being temporary injunction<sup>90</sup>. The other view is that there is a general rule that if a court has right to pass final order in certain matter, then it is deemed to possess such power for passing an interim order also. Hence there is no omission of these provisions in haste<sup>91</sup>. This issue has come up before the consumer fora time and again and the Supreme Court also found occasion to deliberate on this issue.

Reliefs which consumer fora can grant are enumerated in Section 14 of the CP Act. This section, before Consumer Protection (Amendment) Act, 1993, read as under:

1. If, after the proceeding conducted under section 13, the District forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to take one or more of the following things namely:

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90. See S. N. Singh, Consumer Protection Legislation, A Critique 29 JILI (1987) 380 at 385.

91. See S. S. H. Azmi; Sale of Goods And Consumer Protection in India (1st ed. 1992) at 247.

- a) to remove the defects pointed out by the appropriate laboratory from the goods in question;
- b) to replace goods with new goods of similar description which shall be free from any defect;
- c) to return to the complainant the price or, as the case may be charges paid by the complainant;
- d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party.

Commenting on the scope of this section, the State Commissions of Punjab<sup>92</sup>, Rajasthan<sup>93</sup>, Gujarat<sup>94</sup>, Karnataka<sup>95</sup>, Bihar<sup>96</sup>, Orissa<sup>97</sup>, and West Bengal<sup>98</sup> declined to grant an interim injunction on the plea that only final and not interlocutory orders are envisaged in section 14. These Commissions in unison took the stand that section 14 itself states that the District forum can

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- 92. *Punjab State Electricity Board v. M/S. Anand Aggarwal Oils Pvt. Ltd.* 11(1993) CPJ 891; *M/S. Sampuram Singh and Sons v. The Punjab State and Anr.* III (1993) CPJ 1993.
  - 93. *Rajasthan State Electricity Board and Anr. v. Maheshwari Textile Mills Bhilwara*, (1992) 2 CPR 333, *M/S. Sales Office System Pvt. Ltd. and Anr v. M/S. Mayank Photo Copier* (1993) 2 CPR 8 *Rajasthan SEB and Ors v. Hira Lal* (CPJ) 1993 at 183.
  - 94. *General Manager (Telephone) and Anr. v. Smt. Champalaxmi Krushnachandra Dave* (1993) ICPR 121. *Phiroz Savak Sha Green v. Blue Fountain Enterprises & Ors.* 1(1994) CPJ at 339.
  - 95. *Dr.S.P.Thirumala Rao v. M.D. Karnataka State Board Transport* (1991) 1 CPJ; *Akil Karnataka Madwala Machideva Mahajan Singh v. Commissioner, Banglore City Co. & Anr.* (1992) 2 CPJ 543; *The Chairman, Karnataka Housing Board v. Sri K. S. Panchapakshan* (1992) 1 CPR 482.
  - 96. *Telecom. Distt. Engineer v. Smt. Parmila Prasad* (1994) 1 CPR 12.
  - 97. *Telecom. Distt. Engineer v. Prasanta Kumar Chand* 11 (1994) CPJ 198.
  - 98. *Chittranjan Dey v. Mrinal Kant Chakraborty* (1995)3 CPR 347.

direct the opposite party only after it (district forum) has conducted proceedings under section 13. Thus reading sections 13 and 14 together, there is no scope for any interim order. Only final order can be passed under the CP Act.

On the other hand State Commissions of Gujarat<sup>99</sup>, Andra Pradesh<sup>100</sup>, West Bengal<sup>101</sup> and UP<sup>102</sup> held that the Consumer Disputes Redressal Forum has the power and competence to pass an interim order considering the exigency of the situation, prima facie case and balance of convenience and in order to maintain status quo of the property in dispute.

The National Commission in *National Dairy Development Board v. Consumer Protection Council and ors*<sup>103</sup> observed that we are of the opinion that the applicant is well founded in its contention that the impugned interlocutory order passed by the State Commission is totally beyond the scope of powers conferred by the

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99. *Rathod Liljibhai and Ors v. M/S. Escorts Ltd., Original Complaint* No. 303 of 1991 order dated. 27. 11. 1992.

100. *Dr. R. Venkatesh Wara Roa v. The Indian Assurance Co. Ltd.* CDIA No.325 of 1991; *M/S. Sakti Cattle and Poultry Feed Suppliers v. The New India Assurance Co.* CDIA No.327 of 1991 and *M. Kesava Rayhla v. The New India Assurance Co. Ltd.* CDIA No. 328 of 1991.

101. *M/S. Bharat Biscuit Co. (Pvt) Ltd. v. Calcutta Telephone* (1995) 3 CPR 69; *WBSEB v. Rajeshwar Prasad Shaw* (1994) 3 CPR 445; *WBSEB v. Suhasaria Oil and Rice Mills S.C.* Case No.234/R/1994 and *Hindustan Petroleum Corp. Ltd. v. Anil Tolasaria* (1995) 2 CPR 632.

102. *United India Insurance Co. v. Mohd Saleem and Ors.* (1994) 3 CPR 369.

103. 11(1992) CPJ 427 NC.



CP Act, 1986. Section 14(1) of the Act enumerates the reliefs that can be granted by a Redressal Forum constituted under the Act. It is obvious that any relief that cannot be granted even by a final order passed under section 14(1), cannot be given by a Redressal Forum by means of an interlocutory order for the passing of which there is no warrant under any provision of the Act<sup>104</sup>.

In a later case of *Chivayinkil CP Bhadra Kumar v. S. Mhendran*<sup>105</sup>, the National Commission without assigning any reason granted interim stay. The order goes as under:

There will be an interim stay on condition that the appellant should pay to the respondent or deposit before the State Commission for payment on the respondent one half of the amount payable by him under the impugned order of the State Commission within one month from today.

The Calcutta High court in *Re State Transport Authority and Anr*<sup>106</sup>, held that it is well settled that unless a tribunal set up under a special statute is vested with such power under the statute itself, it cannot pass such an order, nor can a tribunal exercise the inherent power prescribed under the Code of Civil Procedure, if such a tribunal is not a court<sup>107</sup>. So far as the

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104. Id at 428. See *The New India Assurance Co. Ltd. v. Dr. R. Venkateshwara Rao* 1(1993) CPJ 61 NC; *District Manager, Telephones and Ors. v. M/S. Monilal Brij Mohan* 1(1993) CPJ 41 NC.

105. 111 (1992) CPJ 71 NC.

106. 11 (1992) CPJ 677.

107. Id at 682.

CP Act is concerned, the procedure to be adopted by a District Forum on receipt of a complaint is laid down in section 13 of the said Act and sub-section (4) of the said section states that for the purposes of the said section, the forum shall enjoy the same powers as are vested in a civil court under the Code of Civil Procedure, while trying a suit, in respect of the following matters:

- i. the summoning and enforcing attendance of any defendant or witness and examining the witness on oath;
- ii. the discovery and production of any document or other material object producible as evidence;
- iii. the reception of evidence on affidavits;
- iv. the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
- v. issuing of any commission for the examination of any witness; and
- vi. any other matter which may be prescribed; and same powers have been vested with the State Commission also as per the provision of section 18 of the Act.

The High Court then concludes that from the above provisions it is thus quite clear, that neither District Forum nor the State Commission has been vested with any power under the CP Act, 1986, to grant and/or pass any ad interim order, nor any of those tribunals is a civil court so as to be deemed as such to enjoy the inherent powers as embodied in the Code of Civil Procedure. These tribunals have been vested with only some limited powers of a civil court as specifically stated in sections 13 and 18 of the said Act and as such the said tribunal cannot travel beyond

their limited powers. Hence the interim orders passed both by the President, Calcutta District Forum and the Chairman, State Commission, are wholly without jurisdiction<sup>108</sup>.

In the meanwhile Consumer Protection (Amendment) Act, 1993 was passed. This Act inter alia amended section 14 and five more reliefs were incorporated in the section which are as follows:

- e. to remove defects in goods or deficiencies in the service in question;
- f. to discontinue the unfair trade practice or the restrictive trade practice or not to repeat that practice;
- g. not to offer hazardous goods for sale;
- h. to withdraw the hazardous goods from being offered for sale; and
- i. to provide for adequate costs to parties.

The Supreme Court in *Morgan Stanley Mutual Fund v. Kartick Das*<sup>109</sup> had unamended section 14 before it. While reproducing clause (a) to (d) of section 14 the apex court held that a careful reading of the above discloses that there is no power under the Act to grant an interim relief or even an ad-interim relief. Only final relief could be granted, if the jurisdiction of the forum to grant relief is confined to the four clauses mentioned

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108. Ibid; See also *M/S. Selex Office System Pvt. Ltd. and Anr. v. M/S. Mayank Photo Copier* (1993) 2 CPR 8; *Rajasthan State Electricity Board and Anr. v. Meheshwari Textile Mills Bhilwara* (1992) CPR 333.

109. (1994) 2 CTJ 385 (Supreme Court) CP.

under section 14, it passes our comprehension as to how an interim injunction could ever be granted disregarding even the balance of convenience<sup>110</sup>.

The above opinion of the Supreme Court being binding precedent by virtue of Art. 141 of the Constitution was followed by the National Commission in *M/S.Escorts v. Rathod Laljibhai and Ors*<sup>111</sup> and Calcutta High Court in *West Bengal State Electricity Board v. Laxmi Ice Plant Industries*<sup>112</sup>, without any reservation.

Since there is no express provision in the CP Act either for granting interim relief or stay, so the problem of staying the operation of the judgment of the lower forum by the superior forum while the latter is hearing in appeal the decision of the former, came up for deliberation before the State Commissions. The UP State Commission in *United India Insurance Co. v. Mohd. Saleem and Ors*<sup>113</sup> held that "we find no limitation, express or

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110. Id at 398.

111. (1995) 1 CPR 333. It was held that "the State Commission had passed an interim order granting relief in the form of a deposit being directed to be made with the Commission pending disposal of the original complaint. As has been laid down by the Hon'ble Supreme Court of India in *Morgan Stanley Mutual fund v. Kartick Das and Dr. Arvind Gupta Securities and Exchange Board of India and Ors*, the Commission has no power to grant any interim relief in original complaint petitions.

112. (1994) 2 CTJ 849 (Calcutta HC) (CP). It was observed: "We are also of the view that neither the District Forum nor the State Consumer Disputes Redressal Commission West Bengal, has any power to grant interim relief to pass interim order as section 14 of the said Act does not vest such authorities with such powers".

113. (1994) 3 CPR 369.

implied, in the provisions of the Act to persuade us to take the view that the commission has no power, during the pendency of an appeal before it, to suspend the operation of the order under challenge in the appeal<sup>114</sup>.

The State Commission made it clear that the consequences of negating the existence of the power to grant stay, during the pendency of an appeal in suitable cases can result in grave injustice, particularly, when the Act does not contain any express provision to direct restitution if the appeal before it succeeds. As an instance, wherein a case the District Forum awards an unduly excessive amount by way of compensation and enforces its order by recourse to coercive methods and the appeal before the Commission against the award succeeds, recourse may possibly have to be taken <sup>by</sup> of the successful party to proceedings before a civil court to recover the amount from the one which succeeded before the District Forum. The delay and expenses involved apart, it will lead <sup>to</sup> the multiplicity of proceedings defeating the very purpose of the Act. The recognition of existence of power in the State Commission to grant suitable interim order, depending upon the circumstances of a particular case, keeping in abeyance the enforcement of the order under appeal wholly or part, upon such condition if any, considered appropriate by it, would advance the cause of justice. Such a view must be preferred to the one which defeats it<sup>115</sup>.

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114. Id at 370.

115. Id at 371.

The State Commission of West Bengal in *D.E.(Cf) Calcutta Telephone v. Mani Kana Gupta Bhayn*<sup>116</sup>. came in agreement with the UP State Commission (Supra) but with different reasons. It was opined that though an interim order by way of injunction is not available before a forum, a stay order or an order for maintenance of status quo in appropriate cases stand on a different footing, as such an order does not purport to make an injunctive order against a person before the dispute is actually heard. It only tends to desist the parties from changing the facts constituting the dispute when the forum is in seision of the matter<sup>117</sup>.

The amendment in section 14 engendered controversy as to the power of the consumer fora to grant interim order. One view<sup>118</sup> is that even after amendment, section 14 does not provide for issue of an ad interim injunction. Section 14(1) as it stands today, makes it very clear that one or more of the directions in terms of its clauses (a) to (i) are to be issued only after the consumer redressal agency has satisfied itself after conducting the proceedings under section 13 that the goods complained against suffer from defects or the services rendered are tainted with deficiency. Section 14 read with section 13 leaves no scope for any order other than a final order<sup>119</sup>.

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116. (1995) 2 CPR 428.

117. Id at 430.

118. S.S.Kumar; Should Consumer Courts Be Conferred The Power To Grant Interim Relief (1996) 4 CTJ 103.

119. Id at

Another view is expressed by the West Bengal State Commission in *W.B.S.E.B. v. Rajeswar Prasad Shaw*<sup>120</sup>. In this revision application, Prof. Sunil Kanti, Member of the Commission held that the Supreme Court in Morgan Stanley's case (Supra) does not prohibit interim injunction. The observations made by the Supreme court in that case were in view of the peculiar facts of the case. Their lordship's observations were that the Calcutta District Forum entertained a case which does not fall within the ambit of the CP Act. Secondly, the interim order passed by the Calcutta District Forum was without consideration of balance of convenience, thirdly, the principles of granting *exparte* and interim injunction as laid down by the Supreme Court have not been followed and fourthly, that the *exparte* ad interim order of injunction granted by the Calcutta District Forum was neither communicated to the Appellant/opposite party nor the copy of the application was served upon him<sup>121</sup>. According to the Hon'ble Member thus, the Supreme Court's opinion is *per incuriam* and does not form any binding precedent. Furthermore, the Supreme Court only considered clause (a) to (d) of section 14<sup>122</sup> and not (e) of the same section which has opened flood gates in respect of power and jurisdiction to the Consumer Dispute Redressal Forum<sup>123</sup>. The learned Member also did not find himself bound by the opinion of the apex commission in National Dairy Development Boards' case

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120. (1994) 3 CPR at 445.

121. (1994) 3 CPR at 447.

122. Id at 447.

123. Id at 448.

(Supra) as it was decided before the Consumer Protection (Amendment) Act, 1993 which has amended section 14<sup>124</sup>. However, in a dissenting opinion of the Hon'ble President, it is stated that clause (e) no doubt gives new relief which can be granted in favour of a complainant but it does not on that count create a new right exercisable at an interlocutory stage. A careful scrutiny of section 14 would make it clear that the amendment in section has not extended the procedural ambit involved in this section. The opening words of sub-section (1) of section 14 are "if after proceeding conducted under section 13, the District Forum is satisfied". So what ever reliefs are envisaged in section 14, the same may be given only after proceedings of section 13 are completed. Section 13 deals with the hearing of objection and consideration of evidence adduced by the parties. In other words whatever relief is granted under section 14 it must be after the opposite party's case is considered (if, of course, he appears and the case is not heard ex-parte). Necessarily, therefore, any relief granted under Section 14 must be final<sup>125</sup>.

Nevertheless, the Hon'ble President was convinced and even made mention that he agrees with Prof. Kar (Member) that for proper adjudication of any dispute the property involved must be preserved or the status quo must be maintained as far as possible and that it is the inherent power of the court to take action in

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124. Id at 450.

125. Id at 451.



such matters even apart from the provisions of Order 39 of the Civil Procedure Code... An interim order in possible cases may be effective and advantageous to the parties<sup>126</sup>. But Hon'ble President found himself bound by the Supreme Court's opinion in *Morgan Stanley* case which forms a binding precedent in view of Art.141 of the Indian constitution<sup>127</sup>.

From the afore discussed case law following points emerge.

1. Consumer Redressal Agencies do not possess the power to grant interim order;
2. Consumer fora are quasi judicial bodies or tribunals and not courts, so they cannot exercise inherent power of the courts to grant interim relief;
3. In view of the amendments made in section 14, Consumer fora can now grant interim relief;
4. There is a difference between stay and interim order. Consumer fora can grant stay but not interim order.

It is submitted that some of the above propositions are neither based on the sound principles of logic nor is there any legal inhibition to hold otherwise on the larger considerations of equity, justice and good conscience.

There is no dispute on the fact that the CP Act unlike MRTP Act does not possess express provision to pass interim orders. It is also not correct to contend that clause (e) of section 14 has any way enlarged the scope of the section to the extent of pass-

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126. Id at 452.

127. Ibid.

ing interim orders. It is worth while to mention here that section 14 of the CP Act was amended in pursuance of the recommendations of the Working Group<sup>128</sup>. This Working Group inter alia suggested that the National commission, State Commission and District fora should be given powers to direct the respondent to (i) remove the defects and deficiencies in the services in question (ii) to issue cease and desist orders or to grant appropriate interim relief. From these two suggestions only first one was incorporated in the CP Act in toto and clause (f) was incorporated which is "to discontinue the unfair trade practice or the restrictive trade practice or not to repeat that practice". This clause is in substance similar to the first part of the second suggestion of the Working Group. The second part i.e. "to grant interim relief" was not incorporated in the Act for the reasons best known to legislators. Thus it is amply clear that clause (e) was not introduced in the CP Act for granting interim relief nor is there any scope to read such powers from the wording of clause (e). Thus it is submitted that the observation of the West Bengal State Commission in *W.B.S.E.B. v. Rajeswar Prasad Shaw*<sup>129</sup> that clause (e) of section 14 permits even grant of interim relief is not correct.

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128. High power Working Group was constituted on 7.1.1991 under the Chairmanship of the then Minister of Food and Civil supplies, Government of West Bengal. See for details, D. N. Saraf Supplement to Law on Consumer Protection in India (1992) at 23-24.

129. Supra note 125.

The question arises, can consumer fora in absence of express provision to grant interim relief, exercise inherent powers to grant the same? In other words do consumer fora have inherent power to issue interim orders? In American Jurisprudence<sup>130</sup> it is stated that a court, once having obtained jurisdiction of a cause of action, has, as incidental to its general jurisdiction, inherent power to do all which is reasonably necessary to the administration of justice in the case before it. In the exercise of this power, a court may, when it is necessary in order to protect or preserve the subject matter of the litigation to protect its jurisdiction, and to make its judgment effective, grant or issue a temporary injunction in aid of or ancillary to the principal action<sup>131</sup>. It is also an established principle of construction that where an Act confers Jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means as are necessary to its execution<sup>132</sup>. This principle of construction was followed by the Supreme court also<sup>133</sup> and any express prohibition for granting interim injunction has been declared ultra vires and

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130. 42 Am Jur 2d injunctions at 11.

131. Ibid.

132. See Max Well on Interpretation of Statutes (11th. ed.) also see Southerlands Statutory Construction, (3rd. Ed.) Art. 5401 and 5402.

133. See *I.T.O v. Mohd. Kunhi* (1969) 71 ITR 815 Sc. It is firmly established rule that an express grant of statutory power carries with it by necessary implications the authority to use all reasonable means to make such grant effective.

struck down as unconstitutional by the MP High Court in *Smt. Basant Kumari v. State of MP*<sup>134</sup>.

However, the question which still alludes answer is, can consumer fora which are in fact not courts but tribunals, exercise inherent power to issue interim orders? The Calcutta High Court in *Re Transport Authority and Anr.*<sup>135</sup> answered it in negative. It is however, submitted that the opinion of the Calcutta High Court is not correct in view of the long line of the contrary decisions of the Supreme Court<sup>136</sup>. In *Union of India v. Paras Laminates (P) Ltd.*<sup>137</sup>, the Supreme court in unequivocal terms laid down:

there is no doubt that the tribunal functions as a court within the limits of its jurisdiction. It has all the powers conferred expressly by the statute. Being a judicial body it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory power... The powers of the tribunal are no doubt limited, its area of jurisdiction is clearly defined but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is of course, limited, by the express grant and, therefore, it can only be of such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective.

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134. AIR 1990 MP 160. See also *Swati Traders v. C.T.O* (1990) 76 STC 393 (Kant). In this case Karnataka High Court went ahead by holding that the inherent power of the tribunal to grant stay cannot even be taken away by a statutory amendment by legislature.

135. Supra note 111.

136. See for instance Supra note 133. *Sujam Kishore and Ors. v. Municipal corporation of Delhi and Anr.* (1993) 1 S.C.C. 22.

137. (1990) 186 OTR 722.

There is no iota of doubt that the interim order can make the final grant effective whether it is the case of unfair trade practice or defect in goods or deficiency of service or staying the operation of the decision of the subordinate forum.

The opinion of the Calcutta High Court in the *State Transport Authority and Anr* (Supra) does not appeal to logic also. Since the remedy of interim order has been bequeathed by equity courts, so when courts have inherent power to issue injunction *ex debito justitiae*, why tribunals be debarred from exercising the same. By no amount of interpretation casuistry can tribunals be restrained from exercising inherent powers of granting interim relief.

It has also been argued that since remedy under the CP Act is time bound<sup>138</sup>, so there is no need of granting interim relief<sup>139</sup>. However, the actual working of the fora has made the time bound decisions still a distant dream. It is evident from the following data<sup>140</sup>.

Forum/Commission	Cases Pending Upto	Total No of Cases Pending
District Forum	Mid 1993	1,30,000
State Commission	Mid 1993	17,700
National Commission	Jan.1994	1,698

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138. Supra note 91.

139. Section 140.

140. See S. S. Kumar, Alarming Increase in Pendency of Consumer cases (1994) 2 CTJ 199.

The stand of UP State commission in *United Insurance CO. v. Mohd. Saleem*<sup>141</sup> and *W. B. State Commission DE(CF) Calcutta Telephone v. Mani Gupta Bhayn*<sup>142</sup>, that consumer fora can grant stay for stalling the operation of the judgment of lower fora but cannot issue other interim orders, is not, it is submitted, correct.

The legal implications of these two injunctions (stay and interim relief) are no doubt different depending upon the situation in which the order is issued. Nevertheless, this dichotomy is neither permissible nor is there any scope to read the same under CP Act. Sections 17 and 21 give power to the State commission and National Commission respectively to hear appeals against the decisions of the District forum or State commission as the case may be. These two sections like section 14 are silent on any interim order or stay the operation of the judgment of the subordinate forum or Commission. Thus to hold that consumer fora can grant stay but not interim relief is not correct. As is rightly said in *W.B.S.E.B. v. Rajeshwar prasad Shaw*<sup>143</sup> that the said submission is somewhat unheard of or is ridiculous because the CP Act as such does not provide any provision in specific language for grant of interlocutory injunction order either in original complaint petition or by the appellate forum. The similar question of powerlessness or incompetency arises when the appellate forum under the CP Act passes any interim order staying operation of the impugned order in the appeal or revision or grants

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141. Supra note 118.

142. Supra note 119.

143. Supra note 134.

stay in the execution which is also an interim order and if the appellate forum has got any right and power to pass interim order to maintain the property in status - quo, then it is not intelligible why the District forum in original petition before it would be debarred to apply the same right and power to preserve the property in status quo by passing an interlocutory interim order.

To sum up, although the CP Act does not contain express provision for granting interim relief, the consumer fora like that of civil courts can exercise inherent powers to grant the same in order to make the final grant effective. It is, however, suggested that sections 14, 17 and 21 be amended<sup>144</sup> to provide for the District forum, State Commission and National Commission express powers to grant stay or interim relief as the case may be in the appropriate cases after following the guidelines laid down by the Supreme Court<sup>145</sup>.

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144. Justice Balakrishnan Pradi also favours amendment to these sections to grant interim relief. See *The Economic Times*, 15 March, 1994 (The Consumer Day). See also R. Santhanam, *DO Consumer Courts Have No Power To Grant ad interim Relief*. (1994) 3 Comp. LJ 43 at 47.

145. The Supreme Court has in *Morgan Stanley* case Supra note 25 laid down following principles (a) whether irreparable or serious mischief will be caused to the plaintiff (b) whether the refusal of ex-parte injunction would involve greater injustice than the grant of it would involve (c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented; (d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant exparte injunction; (e) the court would expect a party applying for ex-parte injunction to show utmost good faith in making the application (f) even if granted, the ex-parte injunction would be for a limited period of time (g) general principle like prima facie case, balance of convenience and irreparable loss would also be considered by the court. pp.395-96. See also *United Commercial Bank v. Bank of India*, (1981) 2 SCC 766; *Shiv Kumar Chada v. Municipal Corporation of Delhi* (1993) 3 SCC 161 at 176.

## **WHO CAN FILE COMPLAINT AND AGAINST WHOM?**

The MRTP and CP Acts have done away with the traditional principle of privity of contract and has accorded locus standi to Central and State Governments, voluntary organisations besides, consumer. At present there is no definition of consumer under the MRTP Act but a comprehensive definition is provided under the CP Act which includes not only a person who has purchased goods for consideration which has been paid or promised but also any one who uses those goods with the approval of the actual buyer but does not include a person who has obtained such goods for resale or for any commercial purpose. Similarly a person who hires service for consideration paid or promised is also a consumer including any beneficiary of such service other than the actual hirer<sup>146</sup>. This definition uses the word "consideration" instead of price or money used in the Sale of Goods Act, 1930 or Transfer of Property Act, 1882 respectively. However it is not

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146. Section 2(d) of the CP Act provides : Consumer means any person who (i) buys any goods for a consideration which has been paid or promised or partly paid or partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or (ii) hires or avails of any service for a consideration which has been paid or promised or partly paid or partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised or partly paid and partly promised or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.



an anomaly<sup>147</sup>. The word consideration has been used in the sense as defined under the Indian Contract Act, 1872<sup>148</sup> with a view to give protection to a larger section of the society designated as consumers<sup>149</sup>. The Act makes a radical and deliberate departure from the traditional way of defining selling<sup>150</sup> and buying<sup>151</sup> of goods<sup>152</sup>.

An interesting question arose in case of *Consumer Unity and Trust Society v. State of Rajasthan*<sup>153</sup> as to whether the direct and indirect taxes paid to the state by a citizen constitute consideration for services and facilities provided to a citizen by the state. The National Commission being influenced by the

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147. See I C Sexana : The Consumer Protection Act, 1986, A view point 30 JILI 321, 326 The learned author argues that it is not understood why the Act adopted this course, when both the Transfer of Property Act, 1882 and the Sale of Goods Act, 1930 dealing with the Sale of immovable property and goods respectively avoided the term consideration and used the term price for money.

148. Section 2 (d).

149. K.R. Chandratre opines that the inference is that a consideration for the purposes of the COPRA should involve "payment" present or future, which will necessarily have to assume the shape of money. See K R Chandratre Hand Book of Consumer Protection Law (Ist. ed., 1993) at 35.

150. Section 2 (i) of the Sale of Goods Act, 1930.

151. Section 2 (d) of the Sale of Goods Act, 1930.

152. See S.S.H. Azmi, Sale of Goods and Consumer Protection in India (Ist. ed., 1992) at 236.

153. See *Hindu Religious Endowments Madras v. Sri Lakshmundra Thirtha Swamiar of Sri Shirur Muttu* (1954) 1 SCR 1005; *Southern Pharmaceuticals and Chemicals Trichur v. State of Kerala and Ors* (1982) 1 SCR 519; *Municipal Corporation of the city of Baroda v. Babubhai, Judgment Today* (1989)3 SC 437; *Sreenwasa General Trader v. State of AP and Ors* (1983) 3 SCR 843.

various Supreme Court pronouncements<sup>154</sup>, held that unlike a fee, a tax, in its true nature is a levy made by the State for the general purposes of the Government and it cannot be regarded as a payment for any particular or special service. While it is undoubtedly true that the Government in a welfare State is under a duty to provide various forms of facilities to citizens and the expenditure incurred thereon will have to be met from out of the consolidated funds of the State, it cannot be said that a tax levied for the general purposes of the State constitutes consideration for any special facility, benefit or service, provided by the State<sup>155</sup>.

This interpretation constricted the scope of this provision. In a Social Welfare State like India services are provided to citizens free of charge. This should not provide licence to the provider of service to cause loss or injury<sup>156</sup>. In view of this decision, the Working Group constituted to suggest amendments to the CP Act<sup>157</sup>, inter alia recommended that a proviso be added to the definition of consumer stating that the consideration shall not be a condition precedent in case of (i) health and medical service (ii) availing of mandatory services provided by the State

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154. (1990) 1 Comp. LJ 314.

155. Id at 321.

156. D. N. Saraf; Some facets of Consumer Justice through Consumer Disputes Redressal Agencies 34 JILI (1992) at 46.

157. Vide Notification No. 9/4/90 - CCI, dated 7th. Jan, 1991.

or local authorities<sup>158</sup>. However, this recommendation did not find favour with the parliament when consumer protection (Amendment) Act, 1993 was passed.

The term "commercial purpose" used in the definition of consumer has not been defined in the Act. The National Commission without elaborating this expression held in *M/S Oswal Fine Arts v. M/S HMT Madras*<sup>159</sup> and *Western India State Motors v. Sobhay Mal Meena*<sup>160</sup> that the complaint cannot lie before redressal forums for the reason, in former case complaint is against the defective offset printing machine and in later case against a defective car which is being used as a taxi. In both these cases goods purchased are used for "commercial purpose". This restrictive interpretation of the word commercial purpose left a good number of consumers without protection. If purchasing a car for using it as a taxi is considered commercial purpose, then hand cart owner using it for carrying goods in the market, purchasing of rickshaw or purchasing of tools by carpenter will also be called as goods purchased for commercial purpose<sup>161</sup>.

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158. D. N. Saraf; Supplement to Law of Consumer Protection in India at 10.

159. 1(1991) CPJ 330 NC.

160. (1992) 2 CPR 415 NC See also *Pushpa Meena v. Shah Enterprises (Rajasthan) Ltd.* Ors 1(1992) CPJ 271. The Rajasthan State Commission held that the Commercial purpose is that purpose the object of which is to make profit. Commercial encompasses all business activities.

161. D.N.Saraf suggested that where the goods purchased cannot be used for gain without the application of labour or skill of the buyer, the purpose should not be deemed to be a commercial : D. N. Saraf; Law of Consumer Protection in India (1st. ed., 1990) at 136.

The threadbare discussion of this term came to notice in *Synco Textiles Ltd. v. Greaves Cotton and Company*<sup>162</sup>. In this case complainant was an operator of oil mill who purchased three power generating sets from the respondent company which were defective. The Rajasthan State Commission held that the sale as one for commercial purpose and declined to grant relief to the complainant. In an appeal to the National Commission, the appellants' counsel made following averements:

1. there is a clear cut distinction between a "commercial organisation", "commercial activity" and "commercial purpose" which Rajasthan State Commission failed to appreciate.
  2. that the original complainant was trading in edible oil and oil cake seeds but not in plant and machinery used for conversion of raw material into finished goods.
  3. this being a commercial organisation, he purchased such plant and equipment including generators to be used as stand-by's in case of power failure to maintain commercial activity and thus to produce the items of finished goods in which he trades for earning profit.
  4. the electricity produced by the generating sets was not for sale; It was only for production purposes as distinct from commercial purpose.
  5. The State Commission's opinion will give rise to an unnecessary confusion and will place an artificial and arbitrary demarcating line in as much as a fridge, a fan, a water cooler etc. purchased and installed in a residence will not be considered as the one purchased for "commercial purpose" and hence would be covered by the Act, but if installed in a factory, a shop, a doctor's clinic or in a lawyer's chamber will become an acquisition for commercial purpose and hence would not attract the provisions of the CP Act. Similarly the same situation will arise in respect of a car purchased by an officer of a company with the funds provided by his employer, and a car purchased by a company for the use of its officer. The latter but not the former would be for "commercial purpose".
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162. 1(1992) CPJ 499.

The National Commission while overruling all the arguments of the appellant's counsel observed that the dictionary meaning of the word "commercial" makes the intention of the legislature clear that they wanted to exclude from the definition of "consumer", any person who buys goods for the purpose of their being used in any activity engaged on a large scale for the purpose of making profit. Since resale of the goods has been separately and specifically mentioned in the earlier portion of the definition clause, the words for any "commercial purpose" must be understood as covering cases other than those of resale of the goods. It is thus obvious that the parliament wanted to exclude from the scope of the definition not merely persons who obtained goods for resale but also those who purchase with a view to using such goods for carrying<sup>on</sup> any activity on a large scale for the purpose of earning profit. But at the same time it is necessary that there should be close nexus between the transaction of purchase of goods and the large scale activity carried on for earning profit<sup>163</sup>.

A strong dissenting opinion was recorded by Y Krishna Member of the WCDRC. He said that the words "any commercial purpose" mean the goods are meant for eventual sale as distinct from immediate resale. Otherwise it will lead to serious anomalies for example, a fridge purchased by a chemist for his shop and for his residence, a fan purchased by a lawyer for his chamber and for his house, a water cooler purchased for a factory and for a

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163. Id at 504.

governmental office will have to be treated differently. The character of any economic activity whose purpose is to make profit or to obtain financial return will be commercial, irrespective of the scale of the activity. The purpose is common to all economic activities. The expression commercial purpose has to be construed narrowly and should be distinguished from commercial production and commercial activity. Sub section 2(i)(d)(1) and (ii) have to be interpreted harmoniously. The interpretation so adopted should be logical and equitable so as to avoid patent anomalies and inconsistencies in the application of the law<sup>164</sup>.

Since the dissenting opinion of Y Krishna was more convincing than the majority opinion, the State Commissions came up with the conflicting opinions<sup>165</sup>. This perforced the National Commission to clear its stand in *Secretary Consumer Guidance and Research Society of India v. M/s BPL India Ltd*<sup>166</sup>. The apex commission admitted that the scope and applicability of the exclusion clause of the definition of consumer have not been specifically developed or highlighted in some earlier judgments.

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164. Id at 508.

165. Orissa State Commission in *Abhey Kumar Pandav v. Bajaj Auto Ltd.* 11 (1991) 3 CPJ 644 held that the purchaser of an auto trailer vehicle for self employment to earn livelihood is a consumer. For similar opinion see *S. Radha Krishna v. The National Small Industries Corp. Ltd and Anr.* (1992) 2 CPR 217 and *Sanjay Vinayak Pant v. M/S Chetna Machinery and Paper Mart and Anr* 1(1993) CPJ 5. On the other hand the Karnataka State Commission in *the Secretary Consumer Guidance and Research Society of India v. M/S BPL India Ltd.* 1(1992) CPJ 140 held that the Paper copier was purchased for commercial purpose.

166. Ibid.

Such as those in *Oswal Fine Arts v. HMT Madras* (Supra)

1. and *Western India State Motors v. Sobhag Mal Meena and Ors* (Supra)

. It was made clear that these decisions are not to be regarded as laying down any proposition that a person purchasing a machine, a car or other items of goods as a means of self employment for earning his livelihood will fall within the exclusion clause of the definition<sup>166</sup>.

While following the above decision, the consumer redressal agencies have held that a van used to run as a taxi<sup>167</sup>, coaches for organising and operating tours<sup>168</sup>, a tractor for hiring out for earning profit<sup>169</sup>, a truck to be used as a public carrier<sup>170</sup>, a computer by a large commercial organisation for expansion of its business<sup>171</sup>, a telecard machine for installation in business premises<sup>172</sup>, an equipment by a manufacturer of paper and pulp for

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166. Id at 144.

167. *Bimil Kumar and Anr v. Maruti Udyog Ltd. and Anr* (1993) 2 CPR 22.

168. *Travels and Trades Pvt. Ltd. v. M/S Swaraj Mazada Ltd. and Ors* 1(1991) CPJ 681 See also *Swaraj Mazada v. Mohan Kumar* 1 (1993) CPJ 54 NC.

169. *Shree Bhanwar Singh v. Manager Isher Tractor Ltd. Jaipur and Ors* (1993) 1 CPJ 309. See also *Bhindra Prasad v. Manager Director, Eicher Ltd. and Ors*, (1993) 1 CPR 290.

170. *Shaheed Hussan v. M/S Shah And Lohia Auto Ltd*, 1(1991) CPJ 56; *Satish Kumar Sood v. M/S Alfa Automobiles and Ors*, 1(1992) CPJ 202; *Tara Prasad Swain v. M/S Swaraj Mazada Ltd and Ors* (1993) 1 CPR 392.

171. *M/S HCL Ltd v. M/S Krishna Naniniak and Sons* 11(1993) CPJ 174.

172. *Marjit Singh v. Dharm Pal Gupta* (1993) 2 CPR 162.

its installation in a factory<sup>173</sup>, glazed tiles, a hot water boiler and mixing tank for using in a hotel<sup>174</sup>, a paper copier for private business<sup>175</sup>, an ultra sound machine for a private clinics<sup>176</sup>, an Xerox machine by a bank for their office use<sup>177</sup>, Yarn for making cloth for sale<sup>178</sup>, purchase of equipment for running an industry<sup>179</sup>; Installation of key telephone electronic system in a commercial concern for business<sup>180</sup>; air conditioner for show room of a firm<sup>181</sup>, purchase of X ray machine for running diagnostic laboratory<sup>182</sup>; purchase of plant and machinery for manufacturing of paper mould egg trays<sup>183</sup>; purchase of cold nut machine for manufacturing of cold forged hex, nut and

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 173. *M/s Alfa Transformers pvt ltd v. Thernax ltd* 11 (1993) CIJ 957.

174. *M/s star paper Mills ltd v. M/s Batubal & Co* (1991) 2 CPR 704.

175. *Lucky Star Estate v. Laxmi Boiler* 1 (1991) CPJ 471 also see *M/s Solvochem intermediates pvt. ltd v. M/s Boiler tee Engineers pvt. ltd.* (1992) 2 CPR 322.

176. *M/s Selex office system pvt ltd v. M. K Jindal* 11 (1991) CPJ 110.

177. *Dr. B S Single v. Chairman/Managing Director indeham ltd.* 1 (1993) CPJ 552.

178. *IDC Elect ltd v. Ajara Urban Co-operative Bank ltd. Ors* 1 (1993) CPJ 65.

179. *M/s Madhusudan Textile v. M/s Durbi Textile ltd.* (1993) 1 CPR 36.

180. *M/s Raba Contel pvt ltd v. M/s printek & Ors.* (1994) 3 CPR 389.

181. *Hi, Hadimba creations v. M/s Escorts ltd.* (1994) 3 CPR 453.

182. *New Empire Silk House v. Carrier Air Co. ltd. and Anr.* (1994) 3 CPR 489.

183. *M/s Agfa Gevaert India ltd v. M/s Jitpal X Ray Pvt. Ltd. and Ors.* (1994) 2 CPR 227.



bolts<sup>184</sup>; purchasing of weight bridge<sup>185</sup>; purchasing of kitchen and cellar equipments for hotel and restaurant<sup>186</sup>, installation of intercom for facilitating work of administration of factory<sup>187</sup>, purchase of EPABX system for better management of business, purchase of chick for poultry farm<sup>188</sup>, all are purchases made for commercial purpose. On the other hand goods purchased for self employment such as a car by builder to use it for his business<sup>189</sup>; an electronic type writer for one's own institution<sup>190</sup>, an auto trailer<sup>191</sup>, kitply for construction of dispensary<sup>192</sup>, machinery for manufacturing reprocessed plastic granules from plastic waste and scrapes<sup>193</sup>, offset

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 184. *M/s Metallex India v. the Karnataka state Financial Corp.& Anr.* (1995) CPR 88.

185. *Supra* note 167.

186. *Mrs. Sheela Thomes and ors v. Managing Director, Kerala Financial Corporation* (1995) 2 CPR 123.

187. *Electro Dynamics v. The Managing Director and Anr* (1995) 2 CPR 129.

188. *M/s Catvision products ltd v. M/s Pragati Computers ltd.* (1995) 3 CPR 363.

189. *M/s Bhatir Poultry farm v. M/s Kewalramani Hatcheries* (1996) 1 CPR 66.

190. *Rajendra Kumar Ganesh Bhai prajapati v. Came Motors pvt. ltd and Ors.* (1992)1 CPR 761.

191. *M/s Network India ltd v. Gudipudi Hanumonthe Sharma* 11 (1993) CPJ 674 see also *Rajesha Mahana v. M/s Auto Controls pvt ltd* (1995) 1 CPR 96.

192. *Abhay Kumar panda v. Bajaj Auto ltd.* 11 (1991) CPJ 644. See also *V.R Reghultaman v. Kerala Automobiles ltd.* (1995)3 CPR 21.

193. *S.Radha Krishna v. The National Small Industries Corporation limited and Anr* (1992) 2 CPR 217.

machine<sup>194</sup>, paper copier<sup>195</sup> or Xerox by an unemployed person for earning livelihood<sup>196</sup>, purchase of jeep car for convenience of partner<sup>197</sup>; concrete mixer of maintaining family<sup>198</sup>; cement for construction of hotel<sup>199</sup>, knitting machine<sup>200</sup>, Electronic type-writer to increase efficiency of office<sup>201</sup>, were held not for commercial purpose.

Any purchase relating to agricultural activity is not considered for commercial purpose. Thus, sunflower seeds for sowing<sup>202</sup>; boiler by a society for pine apple growers<sup>203</sup>;

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194. *Sanjay Venayak Pant v. Chetna Machinery and paper Mart* 1 (1993) CPJ 5.

195. *The Secretary Consumer Guidance & Research society of India v. M/s BPL India ltd* 1 (1992) CPJ 140 see also *Selex office system pvt. ltd and Anr v. Mayank Photo copier* (1995) 1 CPR 24.

196. *Mrs. S Ansuya & Anr through S. M. N Consumer protection council Madras v. M/s Methodox system pvt ltd* (1991) 2 CPR 335.

197. *M/s Govind Bhai Shankerial and co v. M/s Mahindra & Mahindra ltd & Anr* (1994) 2 CPR 339.

198. *Prahled Bhai Kadu v. Sayagi Iron work pvt ltd* (1994) 2 CPR 353.

199. *Hotel Nadadeep V. Rama Chandra Baburao Kohil & Ors* (1994) 2 CPR 211.

200. *Kumari Neena Goswami v. M/s Karam Chand Thaper & Bros ltd & Anr* (1995) 3 CPR 10.

201. *Rajesh Mahara v. M/s Auto Controls (P) ltd* (1995) 1 CPR 96.

202. See for instance *Cheethirals Pullaiah Sons & Anr v. Alvalapati Chandra Reddy & Anr* (1993) 2 CPR 36; *Laxami Agriculture Seed Store v. Dhop Singh and Ors* 1 (1994) CPJ 184.

203. *M/s Indra Fabricators and ors v. pineapple Marketing co-operative society ltd* (1992) 2 CPR 36.

purchase of tractor for land cultivation<sup>204</sup> and hybrid chilly seeds<sup>205</sup> were held to be used for agriculture which is distinct from commercial purpose. The reason for holding agricultural activity as not commercial one, were outlined by the National Commission in *MI Joyti Marketing and projected and Anr v. M Pandian and Anr*<sup>206</sup>. In this case the complainant purchased motor pump set of 7.5 horse power from the appellant for lift irrigation of land. The pump set turned defective. It was held, that (1) when person buys any article for consideration to use it for some self employment in order to earn his own livelihood, the purchase is not for a commercial purpose (2) the irrigation of land by the pump set has no proximate nexus with the ultimate produce or price of the crop. The crop depends upon various factors like seed, fertilizers, pest control etc.

Interestingly, the same Member of the National Commission (Y Krishna) who gave dissenting opinion in *Syno Co textile* (supra) recorded another dissenting opinion here in the light of the majority opinion of *syno co textile* case (supra) and held that the production of commercial crop perse was commercial activity. Besides, modern agriculture is essentially commercial agriculture and as such agriculture is commercial activity. Any purchase made

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204. *Raghbir Singh and Anr v. The Zimidara Engg. Co and Anr* (1994) 2 CPR 355.

205. *Mahboob Baig v. Rayalaseem seeds Corp Anr* (1996) CPR 257.

206. (1992) 1 CPR 781.

by a farmer for the purpose of better farming is clearly purchase for commercial purpose<sup>207</sup>.

The principles laid down in the above case law can be summarized as under;

1.The buyer who purchases goods for earning livelihood by self employment is a consumer and goods so purchased are not for commercial purpose.

2.Where the purchase of goods is for carrying on any activity on large scale for the purchase of earning profit and there is a close nexus between the purchase of goods and the large scale activity, the purchaser of such goods is not a consumer.

3.Agricultural activity is different and distinct from commercial activity.

It is submitted that the above principles are not free from ambiguity. Every vocation is carried on for earning livelihood. Although the word self-employment qualifies the term livelihood, still it is not clear whether the consumer must exclusively use it by himself or he can along with himself also employ others for carrying on business smoothly. Will it make any difference if several persons join hands for earning livelihood by investing labour jointly ? The impracticability of the test can be seen from the observations of the Bombay State Commission in *Dr. Jaswant Singh D Patil v. The Managing Director Kitply Industries*<sup>208</sup>

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207. Id at 785, The Haryana State Commission while deciding the case of *Surinder Kumar v. M/s Escorts Ltd and Anr* 1(1993) CPJ 438 held that the parliament has clearly employed the phrase "commercial purpose" in its generic sense. It would appear that "agriculture" is a genus distinct from commerce and consequently "commercial purpose" and agriculture purpose are genetically different. The core issue is whether a plainly agriculture purpose can be labelled as a commercial one? in our view it cannot be so, Id at 444.

208. (1994) 3 CPR 93.

and the National Commission in *M/s Agfa Geract India ltd v. M/s Jatpal X-Ray Private limited and Ors*<sup>209</sup>. In former case, purchase of Kitply for making dispensary by a doctor who just started his practice was held for commercial purpose but in later case, where five doctors joined together to start practice and to run diagnostic lab, purchase of X-Ray machine by them was declared as meant for commercial purpose.

There is no yard stick to measure whether the activity is large scale or small scale. The test is subjective one. Then the idea as to what constitutes a large scale activity may differ from place to place, time to time and person to person. It is also not easy to ascertain the nexus between the purchase of the product and ultimate production. In *Continental Device India ltd v. Skyland Interiors (P) ltd and Ors*<sup>210</sup>, the purchase of furniture by a company was held for commercial purpose but a case by a builder in *Rajender Kumar v. Came motors pvt & Ors*<sup>211</sup> and a purchase of jeep car for convenience of partners in *M/s Govind Bhai Shank lal & co v. M/s Mahindra & Mahindra ltd*<sup>212</sup> was held not for commercial purpose In *M/s Joyti Marketing & projects ltd Anr V.M. Pandian & Anr*<sup>213</sup>, the National Commission held that the pump set has no proximate nexus with the ultimate produce or price of the crop. The crop depends upon various factors like seed fertilizers, pest control etc. If the seed is bad then there

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209. (1994) 2 CPR 227.

210. (1992) 1 CPR 761.

211. Ibid.

212. Supra note 197.

213. Supra note 206.

will be no good crops. But in *Synco Textiles pvt ltd v. Greaves Cotton & Co ltd*<sup>214</sup>, the National commission opined that the purchase of three power generating sets was for commercial purpose. Here, the apex commission did not take note of the fact that ultimate productions of oil mill was also subject to many attendant factors. For instance supply of raw material to mill, proper functioning of the mill, employees not resorting to strike.

The Working Group constituted to suggest suitable amendments to the C P Act observed:

This provision has caused genuine difficulties to consumers individually or collectively who buy goods for eking out their livelihood like a widow who buys a sewing machine or a rickshaw puller who purchases a rickshaw etc. The group is of the view that the exclusion of commercial purpose has to continue to exclude large scale business from taking advantage of the provisions of the Act as otherwise the consumer courts would get bogged down in inter business wrangles but at the same time it is necessary to safeguard the interests of small consumers who buy goods for self employment to earn livelihood. It is therefore recommended that an exception may be provided to bring with<sup>215</sup> in the purview of the Act, only cases mentioned above.

In pursuance of the recommendations of the Working Group, the CP Act has been amended. An Explanation attached through amendment to the definition of consumer runs as follows;

For the purposes of sub-clause (1) commercial purpose does not include use by a consumer of goods brought and used by him exclusively for the purpose of earning his livelihood by means of self employment.

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214. Supra note 162.

215. Supra note 158 at 10.

This Explanation does not auger well with the main definition of the consumer, for the following reasons:

Section 2(d) which defines consumer, gives right to file complaint against the trader not only to the actual <sup>but</sup> buyer, any one who uses those goods with the approval of the actual buyer. But the Explanation makes it compulsory that the consumer must have first bought the goods in question and then he must have himself used those goods exclusively. Thus where a father purchases an Xerox machine for his son for earning livelihood by self employment, neither father nor his son by virtue of the Explanation will be a consumer for the reason, father has purchased the machine but not used it whereas the son has used it but not purchased it.

Commenting on the import of the Explanation, the supreme court in *Laxmi Engineering works v. P S G Industrial*<sup>216</sup> held that the several words employed in the Explanation viz, uses them by himself, exclusively for the purpose of earning his livelihood and "by means of self-employment" make the intention of Parliament clear that the goods bought must be used by the buyer himself by employing himself for earning his livelihood. A person who purchases an auto rickshaw to ply it himself on hire for earning his livelihood would be a consumer. A person who purchases lathe machine or other machine to operate it himself for earning his livelihood would be a consumer. (in the above illustrations), if such buyer takes the assistance of one or two

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216. AIR 1995 SC 1428.

persons to assist/help him in operating the vehicle or machinery, he does not cease to be a consumer. As against this a person who purchases an auto- rickshaw, a car or a lathe machine or other machine to be plied or operated exclusively by another person would not be a consumer. This is the necessary limitation flowing from the expression "used by him" and by means of self employment in the explanation. The ambiguity in the meaning of the words for the purpose of earning his livelihood is explained and clarified by the other two sets of words<sup>217</sup>.

The apex court admitted that the above construction may not be in tune with the scheme and object of the Act, nevertheless, found himself fettered by the language used in the explanation<sup>218</sup>.

It is submitted that neither the approach adopted by the Consumer Redressal Agencies while interpreting the term "commercial purpose" nor Explanation attached to the definition of the goods further the scheme and object of the Act. Since the CP Act is a beneficial piece of legislation so such construction has to be employed which will benefit the large section of the society designated<sup>as</sup> consumers. As rightly said by the Punjab State Commission in *Ragbir Singh & Anr v. the Zimindara Engineering Co & Anr*<sup>219</sup> that the kernel question arises whether the Redressal Agencies under the Act should fold their hands and blame the

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217. Id at 1432.

218. Ibid.

219. (1994) 3 CPR 335.



draftsman for the Lacuna or in alternative to give force and life to the real intention of the legislation<sup>220</sup>.

It can therefore be interpreted that the Explanation appended to section 2 (d) clarifies the position only in one respect i.e where goods are purchased and used by the consumer exclusively for earning livelihood, those goods are not for commercial purpose. But for the rest, Redressal Agencies have to decide whether the goods purchased are for commercial purpose or not<sup>221</sup>, To determine whether the goods purchased are meant for commercial purpose, the following tests should be applied.

- 1) The goods purchased are not for immediate final consumption.
- 2) There is a direct nexus between the purchase of goods and the profit or loss from their further disposal. Such direct nexus is absent when the goods or services are converted for producing other goods or services.
- 3) there is a nexus of form and kind between the goods purchased and the goods sold. The nexus is absent where goods undergo transformation and conversion.

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220. Id at 258.

221. This opinion is fortified by the ruling of the Supreme Court in *Regional Provident Fund Commissioner Punjab v. Shib Metal works* AIR 1965 SC 1076 that if the words used in the Entry are capable of a narrow or broad construction being reasonably possible, and it appears that the broad construction would help the furtherance of the object, then it would be necessary to prefer such construction. See also *Kanwar Singh v. Delhi Administration* AIR 1965 SC 871.

Section 12<sup>222</sup> of the CP Act provides inter alia that the complaint shall be made by the consumer to whom such goods are sold or delivered or agreed to be delivered or such service provided or agreed to be provided. This section is not in comport with section 2(1)(b) and (d). Section 12(a)(b) gives only actual buyer or hirer a right to file complaint leaving out the user of the goods or services other than the actual buyer or hirer. Section 2(1)(b) says that the complaint means (a) consumer or (b) any voluntary organisation registered under the companies Act, 1956 or under any law for the time being in force or ... consumer is defined under section 2(1)(d) which covers not only buyer of goods and hirer of services for consideration but any one who uses those goods or avails of services with the permission of the actual buyer or hirer. Thus if as per section 12(a) of the Act, only a person who is buyer of goods or hirer of services can make a complaint, then the definition of the complainant and consumer

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222. Section 12 runs as under : A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District forum by:

- a) the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided;
- b) any recognised consumer association whether the consumer to whom the goods sold or delivered or agreed to be provided is a member of such association or not;
- c) one or more consumers, where there are numerous consumers having the same interest with the permission of the district forum, on behalf of, or for the benefit of, all consumers so interested ; or
- d) the Central Government or the State Government.

as given under the Act becomes meaningless. If the user of the goods with the permission of buyer and the recipient of services from the hirer for consideration are treated as consumer, then they must have also right to file complaint otherwise their inclusion is of no use. It is, therefore, suggested that section 12(a) and (b) be amended on the following lines:

A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District forum by

- a. the consumer, or
- b. any recognised consumer association, whether such consumer is the member of such association or not, or....,

When a consumer has to file complaint, the moot point is against whom shall he? Shall he file complaint against seller, whole sale dealer, supplier or manufacturer? Section 2(c) defines complaint as:

Complaint means an allegation in writing made by a complainant that

- i. any unfair trade practice or a restrictive trade practice has been adopted by any trader;
- ii. ....
- iii. ....
- iv. a trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods with a view to obtaining any relief provided by or under this Act;
- v. goods which will be hazardous to life and safety when used are being offered for sale to the public in contravention of the provision of any law for the time being in force requiring traders to display information in regard to the contents, manner and effect or use of goods.

The above definition provides that the complaint shall be against the trader and trader means a person who sells or distributes any goods for sale and includes the manufacturer thereof, and where such goods are sold or distributed in package form, includes the packer thereof<sup>223</sup>.

When the above definition of trader was put to interpretation different opinions were expressed.

The Haryana State Commission in *M/s Subhash Chand Ashok Kumar v. Anil Kumar and Anr*<sup>224</sup> held that it is nowhere laid down in the Act or Rules framed thereunder that whenever a trader or a seller or distributor of any goods is proceeded against under the Act, the original manufacturer of such goods, if any must also be traced and necessarily made liable for the default along with him. There is no provision which either mandates or indicates such procedure nor is there any precedent to support such view.

The Karnataka State Commission in *Prematic International Electronics v. K Subbaraman and anr*<sup>225</sup> held dealer as well as

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223. Section 2(q).

224 111(1992) CPJ 37. See also *M/s Laxmi Agriculture Seed Store v. Dhop Singh & Ors* 1(1994) CPJ 185; *M/s Chaudhary Automobiles, Hisar v. Shri Anil Kumar* (1991)1 CPJ 104. However in *M/s Enfield India Ltd v. N. P. Singh* 111(1993) CPJ 1801 the same Commission held that a plain reading of the definition of trader makes it manifest that a manufacturer is squarely within the ambit of a trader and when defective goods are sold or marketed by him, the consumer can lodge a complaint on the basic cause of action for such goods suffering from one or more defects or deficiency in service.

225. 111(1992) CPJ 120 See also *M/s Manoj Electronics Ltd. v. V.C. Bansal & Ors* 111(1993) CPJ 1718.

manufacturer jointly liable. But Maharashtra State Commission in *M/s Nangia Automobiles v. Somasi Saynand*<sup>226</sup>; Goa State Commission in *Tagore Gracias and Anr v. M/s Essen Computers Ltd*<sup>227</sup>; Rajasthan State Commission in *M/s Ghumar Electronics v. Laxmi Narain & Anr*<sup>228</sup> and Gujarat State Commission in *Bharat Petroleum Corporation Ltd v. Banaskantha District Consumer Education & Research Centre and Anr*<sup>229</sup> held manufacturer liable.

It is submitted that the right approach is to inquire who is responsible for the defect. If it is a manufacturing defect, naturally manufacturer has to be responsible for it. Similarly if defect is the result of mishandling or negligence of the seller, then the seller has to foot the bill.

Akin to this approach, is the opinion of MP State Commission in *Manager M/s Badkul Brothers v. Rajesh Kumar Sen*<sup>230</sup>, it was laid down:

The guarantee is given by the manufacturer if a dealer takes all precautions to comply with the terms of the guarantee and it is not proved that the defects developed due to something done or not done by the dealer, the dealer cannot be held responsible<sup>231</sup>.

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226. 111(1992) CPJ 23.

227. 1(1993) CPJ 19.

228. (1993) 2 CPR 634.

229. (1994) 2 CPR 336.

230. 1(1993) CPJ 532.

231. Id at 533.

It is worthwhile to mention here that the principle of privity of contract is inapplicable under CP Act. Not only actual buyer of goods or hirer of services can file complaint but also user of the goods or the one who avails of those services with the permission of actual buyer can file complaint. Similarly complaint can be filed not only against the seller but also against the manufacturer as is provided by the definition of trader<sup>232</sup>.

**MRTTP Act, 1969 v. Consumer Protection Act, 1986**

When the CP Act, 1986 was passed, inter alia, the Unfair trade practices were also brought within its purview. Section 2(r) before the Consumer Protection (Amendment) Act, 1993 defined unfair trade practice with reference to section 36-A of the MRTTP Act and it was further provided that any unfair trade practice adopted by the owner of an undertaking to which part A of Chapter III of the MRTTP Act applies or any person acting on behalf of or for the benefit of such owner shall not be regarded as an unfair trade practice under the CP Act. Thus for undertakings to which part A of Chapter III of the MRTTP Act applied, the MRTTP Commission had exclusive jurisdiction and consequently, any unfair trade practice adopted by the owner of such undertaking either directly or through any other person acting on his behalf or for his benefit would squarely be within the jurisdiction of

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232. For detail discussion on the applicability of Privity Rule see *S. S. H Azmi Critique on Indian Oil Corporation v. Consumer Protection Council Kerala* 37 JILI (1995) 398.

the MRTP Commission for the purpose of any decision on the question whether it is an unfair trade practice or not. The CP Act had no jurisdiction over the unfair trade practices adopted by such undertakings. At least there was one area over which the MRTP Commission had exclusive jurisdiction. But when the CP Act was amended by the Consumer Protection (Amendment) Act, 1993, certain changes were made in section 2(r) also. The definition of the unfair trade practice was bodily lifted and incorporated in section 2(r) and its clause (2) was omitted. The definition of unfair trade practice under the both Acts is now same. Thus these two Acts have concurrent jurisdiction over the unfair trade practices. The jurisdiction of the authorities under the two Acts will certainly overlap but, still there are areas, where one authority can exercise jurisdiction to the exclusion of the other as the scheme of the two Acts is different in terms of locus standi for filing complaint and relief sought.

The complaint under the CP Act can be filed by the consumer, recognised consumer association, one or more persons where there are numerous persons having the same interest, Central or State Government. But under the MRTP Act, it can be filed by the trade association, consumer, recognised consumer association, Central or State Government, Director General and upon its own knowledge and information, the commission may also inquire into any unfair trade practice. Thus if a trade association wants to file a complaint against the person who has adopted the unfair trade practice, such complaint shall lie before the MRTP Commission only and not before redressal agencies under the CP Act.

Similarly a complaint on behalf of the class can lie only before the redressal agencies and not before the MRTP Act.

Both, the MRTP Act and CP Act give relief to consumer. The word consumer has been defined under the CP Act and not under the MRTP Act. The CP Act provides that the consumer is not only the actual buyer of goods or hirer of services but also includes the person who uses those goods or services with the permission of the actual buyer or hirer but excludes a person who obtains such goods for resale or for any commercial purpose or who avails services free of charge or under a contract of personal service. In absence of any definition of consumer under the MRTP Act, it can be said that the MRTP Act does not recognise any distinction between commercial sale and consumer sale as is maintained under the CP Act. Thus under the MRTP Act a complaint can be filed against a person who has adopted any unfair trade practice and details of the purpose of the goods is immaterial. This is fortified by the fact that the trade association has been given locus standi under the MRTP Act and not under the CP Act.

Both these Acts do not recognise the principle of privity of contract but in two different ways. Under the CP Act, complaint against a person who has adopted unfair trade practice can be instituted not only by the actual buyer of goods or hirer of services but also by any one who uses those goods or services with the permission of the actual buyer. Thus the CP Act gives locus standi to any one who is not party to the contract made between the actual buyer and trader but imposes a condition that such person should have used those goods or services with the



permission of the actual purchaser or hirer. On the other hand, the MRTTP Commission is open for all those who have consumed the goods irrespective of the fact whether they are actual buyers or not and whether while using those goods or services, they sought the permission of the actual buyer or not.

It is possible that a consumer may purchase goods in pursuance of an unfair trade practice (eg. false or misleading advertisement) adopted by the manufacturer. Shall he file complaint against the seller or manufacturer? Section 2(c) of the CP Act provides that the complaint shall lie against the trader and trader has been defined as a person who sells or distributes any goods for sale and includes the manufacturer there of and where such goods are sold or distributed in package form, includes the packer there of<sup>233</sup>. The redressal agencies have expressed conflicting opinions on this point<sup>234</sup>. But under the MRTTP Act, the complaint will lie against any person who adopts unfair trade practice as actual buying of goods is not a condition.

The MRTTP Act can be invoked only when a consumer purchases goods or hires services in response to a representation which is

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233. Section 2(q).

234. See *M/s Subbash Chand Ashok Kumar v. Anil Kumar and Anr* 111(1992) CPJ 37; *M/s Laximi Agriculture Seed Store v. Dhop Singh and Ors* 1(1994) CPJ 185; *M/s Chaudhary Automobiles Hisar v. Shri Anil Kumar* 1(1991) CPJ 104. It was held that the manufacturer should be traced and necessarily made liable for the default. Whereas in *Prematic International Electronic v. K Subbaraman and anr* 111(1992) CPJ 120 held dealer as well as manufacturer jointly liable. But in *M/s Nagina Automobiles v. Samori Saumand III* (1992) CPJ 23 and *M/s Ghumar Electronic v. Laxami Narain and anr.* (1993) 2 CPR 634 only manufacturer was held responsible.

either false or misleading but where a consumer purchases goods or hires services on his own and not in response to a representation, the MRTP Act is inapplicable but CP Act will apply. In otherwords where a person claims something about the goods or services, then those goods or services should be according to the representation made. If they are not, then the complaint will lie both under the CP Act as well as MRTP Act. But where he remains silent and consumer purchases goods which are defective or hires service which is deficient, complaint will lie only under the CP Act.

When it is established that the unfair trade practice was adopted by the respondent, the possible reliefs to consumer under the MRTP Act are (1) injunction against the respondent (2) cease and desist order or an undertaking from the respondent that he shall purge the trade practice from being prejudicial to the public interest (3) to direct the respondent to issue corrective advertisement.

Whereas under CP Act the respondent may be directed to remove defect or replace goods with new ones or remove deficiency in service; to cease and desist from such unfair trade practice; to return the consumer, price or the charge as the case may be. But consumer redressal agencies cannot order to issue corrective advertisement nor is there any express provision for issuing of injunction. Thus the complainant will have to make choice of fora as per the relief which he is desirous to obtain.

# ***Chapter VIII***

## **CONCLUSIONS & SUGGESTIONS**

The needs of the pastoral society of the past were few and simple. The rapid growth of the economic development coupled with the amazing progress of the science and technology changed the wants and needs of the society. The change of market structure and the stiff competition of the producers, forced them to devise means and methods to place the consumer in a mood to buy. Studies are being conducted to elicit the consumer preferences and trained business executives are given the job of sale of goods or services. The complex manufacturing process forced consumers to rely more and more on the information disseminated by the producers. This gave much scope to the unscrupulous traders to exploit the ignorance of the consumer. In order to harvest it to the maximum, sales promotion schemes are adopted which are false, or misleading. These promotional schemes not only lure potential customers away from truthful producers and injures individual consumers by inducing transactions premised on inaccurate information; it also misallocates economic resources by leading customers to purchase products that do not match their wants. Such practices are injurious to competing producers also as the money taken by the unscrupulous producer is the money taken from the honest businessman. Thus there is a clear public interest in controlling these unfair business practices.

The unfair trade practices incorporated in the MRTP and CP Acts are basically those commercial advertisements which are false, misleading or unfair. These advertisements raise many

and  
issues for researcher to ponder. The MRTTP Commission, CDRA's have been armed with the powers to control these unfair business practices. These powers are inadequate. The Regulatory agencies have also failed to evolve a plausible jurisprudence. So for proper understanding of these issues and the suggestions thereof, the thesis has been divided into following chapters.

Chapter I is introductory in nature in which a brief account of the issues which have not been hitherto addressed or have not been satisfactorily answered, have been projected. The research methodology along with the objectives set for the present research have been elucidated. The research design to accomplish these objectives has been given.

Chapter II dwells on the historical development of the law relating to unfair business practices. Initially the remedies available to consumers were of three types.

(1) Civil suit by consumers. The remedy sought to be enforced through civil suit was either tortious or contractual (2) Civil suit by competitor (3) Criminal prosecution.

The remedy under law of torts was almost illusory because of the requirements of proof. It has to be proved that the reasonable consumer would have been deceived by such advertisement. Only intentional misrepresentation was actionable and representation should have been relating to past or existing fact and not an opinion of the seller.

The contractual remedy has remained under the dominance of the three common law principles namely, Caveat Emptor, sanctity

of contract and privity of contract. Caveat Emptor suited to the conditions when goods were simple. The seller and buyer were face to face, Apotheosis of the promise was possible before the advent of the Standard Form Contracts and privity of contract bears some significance in cases of commercial sales and not in consumer sales. The twentieth century developments have proved that these catch phrases of the past have outlived their utility. The market structure of the past has undergone a sea change which the propounders of these doctrines might not have envisaged. Although the courts have evolved principles to mitigate the rigour of these doctrines, there was need to provide new legal frame work to guard consumer interest. This was met by passing the MRTP and CP Acts.

Chapter III covers the first part of the definition of unfair trade practice. It says that unfair method, unfair or deceptive acts should not be adopted for promoting sale, supply or use of goods or services.

However, it is not made clear as to whether goods involve only existing goods or also future goods. It has been suggested that the future goods should also be brought within the confines of the definition. Otherwise practical difficult will ensue. Firstly, where for example a company whose goods are still in the manufacturing stage falsely advertises that the goods are of particular quality and discontinues the advertisement when goods are actually thrown open in the market. Then a consumer who purchases goods in pursuance of the advertisement will get no compensation for any loss or injury as the goods were not in

existence at the time when advertisement was made . Secondly, if the view that the goods must be in existence at the time when representation was made is upheld then the same test should be applied to service also. Since services, unlike goods have no permanent existence and may be regarded as being inchoate until they are actually supplied, It will be difficulty to bring a representation within the definition for example the quality of services which have not at the time the representation is made, actually been supplied.

The application of the MRTP and CP Acts to shares and debentures has remained still unresolved. The present interpretation of the Unfair Trade Practice, Trade and Trade Practice makes it necessary that the company must trade in shares and mere issue of shares to public for raising capital cannot be called as a trade practice. This view is taken inspite of the fact that the MRTP (Amendment) Act, 1991 amended the definition of goods so as to cover shares before allotment also. This interpretation has left the purchaser of shares and debentures outside the protection of the CP Act and MRTP Act unless the definitions of trade and trade practice are also amended. Even this will not bring shares and debentures within the purview of the CP Act for the reason, goods are defined in the CP Act with reference to the sale of Goods Act and shares before allotment have not been expressly covered like the MRTP Act and also shares after allotment cannot make the purchaser, the consumer, as the shares are meant for commercial purpose or for resale. so it is suggested that the shares and

debentures be treated as service falling within the term "finance" as expressly mentioned in the definition.

The scope of the expressions, "unfair method, unfair or deceptive acts", used in the definition have not been outlined. Initially in America the term unfair was said to cover a practice which is unlawful, offend public policy as laid down in statutes, the common law or otherwise or which is immoral, unethical, oppressive or unscrupulous or which causes substantial injury to consumers or competitors. It has been argued that these criteria are vague and the terms used are devoid of precise meaning. Although in America new doctrine of unfairness suggests that the substantial injury to the consumer and violation of public policy are two tests required to determine whether a trade practice is unfair, still these test cannot guard properly consumer interest in India as the substantial injury element in America excludes an injury which consumers themselves could not have reasonably avoided. This test will cover only those situations where consumer was coerced to purchase and element of public policy is still there. Therefore following definition has been suggested for unfair trade practice.

An unfair trade practice is a trade practice which causes substantial injury to consumers which is not outweighed by an offsetting consumer or competitive benefits that the practice produces.

Explanation: while determining as to whether injury to the consumer is substantial, regard shall be had to the value of the goods or services in question.

The term deceptive act has also not been explained. In America conflicting opinions have been expressed on this point.



One view is that it is an act or practice by which consumers if acting reasonably would likely to be misled to their detriment by a material representation. Another view is that an act which is capable of misleading to a substantial number of consumers with regard to material facts. These two views have been analysed and it has been found that both of them are inadequate as consumer protection laws in India are recent in origin and level of consumer awareness is not so high as it is in America. so following definition of deceptive act has been suggested.

A deceptive trade practice is a trade practice which has a potential to mislead consumers of ordinary intelligence with regard to material facts.

Chapter IV titled Commercial Advertising - legal perspectives deals with issues like, constitutional protection, application of mens rea, standard of protection, defence of puffing, television commercials, comparative advertising and interpretation of advertisements.

After initial wavering it has come to be judicially recognised that the commercial ads enjoy constitutional protection. This is considered by the researcher a positive step as the profit motive alone should not be the determining factor for an advertisement to fall outside the freedom of speech. However, this does not mean that the advertiser has a right to be wrong but there should be no censure on the dissemination of truthful information needed by the large section of the society designated as consumers merely on the ground that the information has commercial motives. This will naturally need the gleaning of

information necessary for subserving public good from that which is false or deceptive.

The application of the mens rea to commercial advertisements has not received judicial notice. The words like, falsely, intentionally, knowingly have been used in the definition of unfair trade practice which connote mens rea. Then should mens rea be imported in the definition of unfair trade practice and only in its presence should trader be held liable to compensate for any loss or injury to consumers?

It has been suggested that the answer to this question should be in negative as the class of practices legislated in the Acts are not criminal in any real sense but are practices prohibited under penalty. The efficacy of the two Acts cannot be attributed by reading mens rea in the liability for compensation to the consumer who has suffered loss due to the false representation. The compensation is the only tangible remedy available under the two Acts to deter the unscrupulous trader.

The aim of the law controlling unfair trade practice is to protect the consumers, who include, credulous and gullible, reasonably intelligent and the average consumer. Then the question is whose intelligence be treated as a standard for determining as to whether an advertisement is false, deceptive or not? It has been argued that the Indian consumers are not only unorganised, ignorant, ill informed and ill advised, they are also ignorant of their rights. Consumers are not conscious of the surreptitious methods of the traders. Traders are fully in know of the plight of

the consumers. They therefore, harvest it to the maximum. So it will not serve any worth while purpose if "reasonable man's" standard is upheld, leaving vast majority of credulous, gullible and unthinking, unprotected. However, this common man's test cannot be regarded as a general standard applicable in all situations. The context in which an advertisement is addressed should also be taken into account. For example, where an advertisement for a specialised equipment is directed at an expert group, such as engineers, the standard will be different as against the advertisement addressed to general consuming public or directed to children.

By virtue of defence of puffing a wide latitude is allowed to traders in extolling the qualities of the products they have to sell. So long an advertiser confines himself to general praise of his goods, he is safe, no matter how exaggerated his praise may be. The underlying argument in the defence of puffing is that no reasonable man shall believe such advertisement as true. But this defence cannot reconcile with the common man's test as advocated above. Furthermore, an advertiser will not resort to puffing unless he has a faith that the gullible consumers will be allured by his campaign. Thus it is suggested that the commercial puffery be made actionable .

The television commercials have given new dimension to the false and misleading advertisements. Sometimes it is not possible to advertise a product with its natural colour or with the composed substances for example true colours of coffee, and orange juice are lost in transmission on a television screen and

artificial substance must be substituted to obtain a natural look. This involves the problem of interpretation of television commercials. One possible interpretation is to treat demonstration merely a dramatization of the express claim made in the advertisement. Thus the demonstration is unconnected with the express claim and so long express claim is true, the advertisement will not be treated as deceptive even though the demonstration was accomplished by trickery. Second approach is to treat television demonstration as a warranty without taking into account the express claim. Thus the demonstration obtained by employing trickery will be considered as deceptive but it is not necessary that the demonstration should prove the express claim made in the advertisement. The third approach is the combination of the first two, i.e to interpret a television demonstration both a warranty that the result could be duplicated without trickery and a proof of the express claim made in the advertisement. A demonstration which failed <sup>in</sup> either of these tests <sup>Two</sup> would be considered deceptive and would not be permitted. It is suggested that the demonstration as well as the express claim made should be correct. In other words an advertisement should be accurate at both ends of the TV camera.

To determine whether a particular comparative advertisement is false or misleading is not free from difficulty. For the reason (a) there is no clear line between "comparative and non comparative" (b) a considerable amount of puffery has traditionally been allowed in advertising, the same is true in case of comparative advertising. The limits of permissible puffery are far

from being clear. It will not be out of place to mention here that it has been suggested above that the commercial puffery be held actionable which should include puffs employed for comparative advertising also.

In India there is no clear cut policy regarding the insignificant comparisons or where a trader describes accurately competitors goods but exaggerated the merits of his own goods. Besides the quality comparisons, there is no legislative or judicial policy regarding the price comparisons. It has been suggested that the insignificant comparisons should be declared as misleading. Otherwise an advertiser will focus more on insignificant comparisons and will derive benefit out of all proportions and what is insignificant will vary from case to case. Where an advertiser after truthfully stating the merits of the competing product, falsely embellishes his own, it is suggested that it should be treated as unfair trade practice. Since an advertiser misrepresents his own goods, such misrepresentation will be no less unfair by mere fact that the advertiser fairly states the quality of its competitors goods. Following are the suggestions which should be incorporated in the MRTP and CP Acts for regulating comparative advertisements.

1. The aspects of the advertisers product which are being compared with the competitors product should be made clear.
2. The comparisons should be factual, accurate and capable of substantiation.
3. There is no likelihood of the consumer being misled as a result of comparison, whether about the product advertised or that with which it is compared.

4. The advertisement should not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implications.
5. The subject matter is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case.

The commercial advertisements are either informative or persuasive. The informative content of advertisement has raised many problems of interpretation. Several suggestions have been made for the interpretation of advertisements in the light of the Judicial decisions.

Chapter V discusses specific categories of false and misleading advertisements. Various sub clauses of the definition laying down different forms of false or misleading representations are not properly worded. Sub clauses (i), (ii), (iii) talk of representations which are false, Does it mean that if a representation is of the nature mentioned in these clauses which is not false but misleading, will be outside the purview of these clauses? Although it may be argued that (1) false representations encompasses misleading representations as well and (2) the words "unfair or deceptive acts used in the main body of the definition are wide enough to include misleading statements also, then what is the need of retaining the word misleading in sub-clauses (vi), (ix), and (x). It is therefore suggested that in order to remove any doubt, sub clause (1) be amended on the following lines.

The practice of making any statement, whether orally or in writing or by visible representations which is false or misleading that ---

The word "falsely" used in clauses (i), (ii), (iii) and the words "falsely or misleading" used in clauses (vi), (ix), (xi) should be dropped.

Clause (i) says that it is "the practice of making any statement. The word "practice" means repeated action, habitual performance or succession of acts of similar kind. In other words it must be more than one act. If this interpretation is given to the word practice, then single act of representation will not constitute unfair trade practice. It is suggested that clause (i) be read with section (v) (ii) of the MRTP Act so that a single or isolated act of any person in relation to any trade is enough to stamp any trade practice as unfair provided of course other characteristics of unfair trade practice are found.

A thread bare discussion on clauses (i) to (x) has been made. The expressions not yet put to interpretation and those on which conflicting opinions have been expressed, have been discussed along with some alternatives.

Fictitious bargain offers have raised many legal issues either relating to interpretation or limitation of the provision dealing with the bargain offers. For instance, if the trader disparages his own goods and thereby induces the buyer to switch over other item available at higher price and more profitable to

the trader, he will not be covered under the present provision which will be violated only when the bargain offer is not so or is not available for a reasonable period or in reasonable quantities.

A question arises; are the labels on the goods as offers? There are two possible interpretations. One is not to use the term offer here in a technical sense and not to insist on the dichotomy of the offer and invitation to treat . This will bring all that in the ambit of the term advertisement which might otherwise be excluded if the offer is given a restricted meaning

The other interpretation is to give offer narrow meaning in the sense as understood in the contract law. It is suggested that the former view should be preferred over the latter as it will widened the reach of the provision. Other wise , the trader will escape from liability by contending that he never made an offer.

The provision requires that the intention of the trader not to sell advertised goods must be proved. This will give respondent an opportunity to escape from liability by contending that the non availability of goods was due to reasons beyond his control. It is therefore suggested that the provision be amended so as to dispense with the requirement of intention.

The provision dealing with the bargain offers has an Explanation attached which has two clauses. Clause (a) says that the bargain price means a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or



otherwise. This clause is ambiguous. It does not make clear as to whether the ordinary price is the price of the trader who has made a bargain offer, or any other trader. This Explanation will also not help where a retailer who owns two or more outlets may indicate in shop A that an article was previously sold at a higher price when it was so sold only at shop B. This problem will be added up if shop B is at a considerable distance away and possibly in an area where retail margins are normally higher than those in the area of shop A. Clause (a) of the Explanation is also silent about the time during which the ordinary price should be in vogue. Thus runs the danger of unscrupulous traders raising prices today, lowering them tomorrow and then claiming price reduction. Similarly advertisements like buy today for Rs 100 and not tomorrow for Rs 200 or buy now before price rise will not be covered by the explanation. It is therefore suggested that the Explanation attached to the provision dealing with the bargain offers be recast so as to cover above discussed situations.

It is suggested that there should be no fixed period for determining reasonableness of time during which a bargain offer should last, for the following reasons:

1. The period may vary from case to case depending upon the nature and size of the business, quantity at sale and nature of the market in which business is carried on;
2. No hard and fast rule can be laid down regarding the reasonableness of the period, what may be reasonable period for a particular item may not be reasonable for another;

3. If the rigid rule about the reasonableness of the period is upheld, then even the bonafide bargain offers will fall within the proscription. For example, where there was a bargain offer for a limited sale which did not last for a prescribed period, the traders will be hauled up for not providing the goods in accordance with the offer.
4. Where for example bargain offer relates to the sale of 10 radio sets or 20 refrigerators, the question of prescribing a period does not arise and the offer shall remain valid till the last set is disposed of.

The question as to whether the offering of gifts, prizes or conducting of contests, lotteries, game of a chance or skill are per se unfair, has been debated before the MRTP commission time and again. The commission expressed conflicting opinions and the issue is still unresolved. In order to maintain balance between the legitimate interest of the traders and the consumers, it has been suggested;

1. offering of gifts or prizes genuinely should not be prohibited
2. lotteries are against public policy and therefore should be prohibited
3. lotteries which do not directly or indirectly demand public subscription should be permitted
4. lotteries which run on the finance raised by the public subscription and which involve skill to a substantial degree are not in fact lotteries but game of skill, so it should not be proscribed.

The provision controlling sale or supply of goods hazardous to life is ambiguously worded. It does not make clear as to whether manufacturer or seller is responsible to consumer in case loss or injury is caused to the consumer. It has been suggested

that the proper course is to see who is responsible for loss or who is in a position to control the danger.

This provision makes liability dependent on the negligence. The liability under the law of torts is strict and transborder laws also provide no fault liability in such cases. There is no reason not to adopt the same rule in such case also. The liability under this provision arises only when the goods do not comply with the standards prescribed by the competent authority. However, neither in the MRTP Act nor in CP Act, there is any authority designated to prescribe standards which the traders must follow. Under the Bureau of Indian Standards Act, 1986 licence or its renewal is made only when the manufacturer complies with the Bureau of Indian Standards Certification Mark. However, non compliance do not stamp the goods as perse hazardous nor is it compulsory that all the goods shall conform to the requirements of certification mark. It is suggested that in order to minimize the dangers which the hazardous goods are likely to pose, an independent body be constituted with the powers to prescribe standards. The standards be made compulsory and the MRTP and CP Acts be given powers to enforce these standards.

Chapter(v) covers powers of the MRTP commission vis-a vis unfair trade practices. This chapter has been divided into six sub chapters which are (1) power to issue injunction (2) power to grant compensation (3) power to review orders (4) power to punish for contempt (5) power to pass cease and desist order and consent order (6) power to order corrective advertisement.

The provision dealing with the issue of injunction uses the expression "during an inquiry before the commission". On this issue, conflicting opinions were expressed by the High courts and the MRTP commission. One view is that the inquiry must be pending before an application for injunction is made. Another view is that the pending inquiry before the commission is not essential but prima facie existence of grounds for entertainment of the complaint will suffice. It is suggested that the proper interpretation of section 12 A would be, that the sooner the commission issues a notice of inquiry, either suo motu or on the application of the person, the inquiry is deemed to have started. it would not be wrong to stretch this theory a little more by stating that when a complaint is filed, the commission is seized of the matter, the inquiry starts.

It is not clear as to whether the MRTP commission can exercise powers of civil court under Civil Procedure Code for breach of an injunction order? It is suggested that the approach of the MRTP commission should be to arrogate power to punish for violation. However, it appears that the suitable follow up provisions to fully effectuate this power under sub section (2) of section 12-A have not been made and therefore in a given case how the commission would proceed to, say commit person to civil prison for infringement of the injunction order, remains ambiguous . Section 135 of the Code of Civil Procedure, 1908 read with sections 55, 57 and 59, suggest that the person to be arrested is to be brought to the court, Sub section (2) of section 12-A does not expressly provide that any reference to court in Order xxxlx rule

(2-A to 5) shall be construed as reference to commission. Thus sub section (2) be amended to remove this anomaly. At present injunction cannot be passed against those, aiding, abetting or conspiring the actual wrong doer. So one more clause be attached to section 12 (A) so as to encompass the above persons also. Whether the interim injunction order is appealable or not is yet to be resolved. However, examples are in galore where the High courts or the Supreme court was called in aid to stay the operation of the injunction order. It is therefore suggested that the injunction order be made appealable before the Supreme Court with a clause stating that an injunction order passed by the MRTP commission shall not be called in question in any High court.

The provision dealing with the compensation provides that in case loss or injury, compensation will be given to consumer. But the word consumer has not be defined in the MRTP Act. So it is not clear as to whether the term consumer includes user of the goods who is not the actual buyer. It is suggested that the definition of consumer as provided under section 2 (d) of the CP Act be incorporated in the MRTP Act also.

Section 36B does not accord locus standi to trader but like section 12-A, section 12 B, arms the trader with the power to file compensation application. Does it mean that before filing compensation application, it is not necessary that a prior inquiry be instituted. Section 12-B is silent on this point. The relevant words in sub-section (1) are "as a result of the monopolistic or restrictive or unfair trade practice...." These words do not show that inquiry is a condition precedent for filing

compensation application. Further more, clause (3) of section 12-B provides that the commission may, after an inquiry into the allegations made in the application filed under sub-section (1), make an order directing the owner of the undertaking or other person to make payment....." The words in this sub clause show that an independent inquiry is to be instituted under section 12-B. Thus it is not necessary that before filing an application for compensation, existence of any monopolistic, restrictive or unfair trade practice must have been established through inquiry. Through compensation application itself the allegation can be proved.

There is no guidance in the MRTP Act and the Rules and Regulations framed thereunder regarding the principle for measuring damages. The MRTP commission expressed conflicting opinions on this point. Some Benches of the commission applied law of contract and some law of torts. It is suggested that the principles of law of torts be applied for the following reasons:

- 1). Under law of contract there is a well established rule that while quantifying the damages, the terms in the contract should be construed strictly where as under law of torts, courts award exemplary damages also, so as to deter the wrong doer from causing harm to the society.

- 2). Under the law of contract, courts do not generally award punitive damages. Since under the MRTP Act, perpetrator of wrong cannot be imprisoned, compensation can be used as a tool to prevent unscrupulous trader from resorting to unconscionable business

practice which is possible under law of torts and not under contract Act.

The MRTP (Amendment) Act, 1991 provides provision for class action suits. However the MRTP commission held that a voluntary registered consumer organisation cannot file suit in the representative capacity as it cannot be said to have the "same interest" as the class has. It is therefore suggested that an Explanation be provided either in the MRTP Regulations or MRTP Act that a recognised consumer association shall be deemed to have the same interest as the consumer on whose behalf the consumer association has filed the complaint. Another issue relating to class action suit is what constitutes "same interest". One view is that it implies common grievance and common interest arising out of the same transaction. Other view is that there must be common question of law and fact and common question must predominate the individual question. The consumer class action is based on Order/Rule 8 of the Civil Procedure Code. An Explanation was attached to this Order on the recommendations of the 54th Report of the Law Commission. It was made clear that the "same cause of action" is not necessary for representation suit. Thus it will be sufficient if it is shown that the members of the class are "similarly situated" or there exists "common question of law and fact".

The power of MRTP commission to amend or revoke its earlier order raises many problems of interpretation (1) Is this power unlimited or, is it subject to limitations? What is the extension of the commission's power ? Does the expression " in the manner

in which it was made", imply that the commission by invoking this provision, can order fresh hearing?

It is the discretion of the commission whether to exercise power or not under this provision. However, the discretion cannot be arbitrary vague or fanciful. It must be guided by relevant considerations. Although there are no apparent limitations on this power, it cannot be construed so wide as to permit rehearing on the same material. It has to be kept in mind that basically this is a corrective or rectificatory power, so it cannot be exercised to order fresh hearing. The expression "in the manner in which it was made cannot be construed as giving power to the commission to make fresh order in the same way as previous order was made i.e. by hearing parties and witnesses. But it merely indicates a procedure to be followed by the commission in amending or revoking an order.

The power to punish for contempt was incorporated in the MRTP Act in the year 1991. No case has been decided yet in which the MRTP commission has exercised this power. The approach of the courts has been to disallow contempt application where there is an effective alternative remedy for enforcing the decree. If this dictum is applied to the MRTP Act, a case for civil contempt will rarely be made as the punishment provided under section 12 of the Contempt of Courts Act is a maximum of 6 months simple imprisonment or a fine which may extend to two thousand rupees or both. Even an apology may sometimes suffice. On the other hand, the punishment under section 48-C of the MRTP Act for violation of the orders of the commission is a minimum of six months (for



otherwise reasons have to be recorded) which may extend to 3 years and fine which may extend to 10 lakh rupees. However, only effectiveness which Contempt of Courts Act has, is the summary nature of the proceedings. Whereas section 56 of the MRTP Act empowers the courts to try offences and commission itself cannot take cognizance.

Section 36-D(2) of the MRTP Act allows the commission not to pass cease and desist order where respondent gives an undertaking to remove the prejudicial effect of the trade practice. It is not clear as to whether violation of such undertaking be called as violation of section 36-D so as to bring erring respondent within the clutches of section 48-C. Section 2 of the Contempt of Courts Act, 1971 expressly provides that even wilful disobedience of the undertaking given by the court is treated as civil contempt. So section 2 of the Contempt of Courts Act will take care of the grey area left by section 36-B(2) of the MRTP Act.

The courts have expressed conflicting opinions on the question of justification for the contempt. One view is that the truthfulness or factual correctness is no defence for contemptuous act. Quite opposite of it is the other view. However, it is suggested that the fair comment and good faith should be regarded as a valid defence.

Section 36-D which gives power to the MRTP commission to pass cease and desist order is not in consonance with section 36-B which gives inter alia power to the commission to file complaint sue motu either upon its own knowledge or information.

Section 36-D provides that the "Commission may inquire into any unfair trade practice which may come before it for inquiry". This expression does not embrace within its import the suo motu inquiry which the commission is competent to institute by virtue of section 36-B. It is suggested that the words "come before it" should not be interpreted to mean that it would come before the Commission from other sources than its own knowledge and information. However, in order to avoid any possible controversy, it is suggested that the words which may come before it for inquiry be omitted from section 36-D.

An interesting question arises in respect of the unfair trade practice discontinued since the complaint is filed. In such cases the Commission has dropped proceeding once it is satisfied that the practice in question has been discontinued. It is submitted that this approach will provide an escape route for the trader. It is therefore, suggested that an explanation be attached to section 36-D making it mandatory for the Commission to launch fullfledged proceedings irrespective of the fact whether the prohibited practice is in force or has been discontinued. On reaching to the conclusion that the disputed practice although discontinued, was prejudicial to public interest, a desist order can be passed so that if it is repeated, the violator will be punished under section 48-C. If the approach as suggested, is not adopted then the Commission cannot punish the violator for repeating a prohibited practice as section 48-C makes punishable the Commission's orders and mere dropping of proceedings cannot by any stretch of imagination be called as an order.

A single trader or a class of traders cannot file a complaint. Naturally no cease and desist order can be passed even if the practice is injurious to competing trader or class of traders. Since under section 12-A injunction can be granted on the application of a trader or class of traders and under section 12-B compensation can be granted to a trader or class of traders, so there is a need for harmonious construction of sections 12-A, 12-B, 36-B and 36-D. This can be possible only by interpreting the words "Public interest" under section 36-D as to cover both, class of traders as well as a single trader. However, it is suggested that like consumer, trader may be accorded locus standi under section 36-B and Commission be empowered to pass cease and desist order, where a trade practice is prejudicial to competing trader. Since trader as compared to consumers are more alert and conscious of the tricks employed by their competing traders, so arming them with the power to file complaint will help in controlling unfair trade practices.

The issues surrounding consent order are; (1) Is consent order appealable where complainant or D G is not satisfied, (2) Is violation of consent order punishable under section 48-C. These twin issues can be resolved by answering to single question: Is consent order also an order under section 36-D. Conflicting opinions have been expressed on this point. It is submitted that the consent order be treated as an order and breach of it punishable under section 48-C. Otherwise consent order will provide a gate way of escape, for respondent who will give

readily an undertaking knowing fully well that the breach of it is not going to affect him in any way.

Chapter VI cover powers of the consumer forum which include power to remove defects or deficiencies, power to award compensation, power to enforce orders, power to pass interim orders and who can file complaint against whom and general observations relating to MRTP and CP Acts.

Section 14 of the CP Act provides powers which consumer fora can exercise. However, this section says that these powers can be exercised only when goods are found defective or any of the allegations contained in the complaint relating to services is proved. But a complaint can be filed not only against the defective goods but also against the unfair or restrictive trade practices, excessive price charging and goods hazardous to life. It is therefore, suggested that section 14 be recast to provide, "if after the proceedings conducted under section 13, the District forum is satisfied that any of the allegations contained in the complaint is proved".

At present consumer fora do not possess power to order return of excess price charged. Section 14 be amended in order to incorporate a clause which will run as follows:

To return the consumer, price charged in excess of the price fixed by or under the law for the time being in force or displayed on the goods or its package.

The powers of the consumer fora are restricted to section 14. It is suggested that a residuary clause be incorporated in section 14 which should run on the following lines:

To grant such reliefs as the District forum deems fit in the interest of justice.

The compensation provision was interpreted in such a way as to create an impression that the compensation is the relief available for deficient service only. However, this is not correct. The compensation provision is general one and is available to consumer when he proves any of the allegations in complaint which occasions loss to him and that loss is caused due to the negligence of the opposite party.

The relief in terms of compensation is dependent on the negligence of the opposite party. In Industrially advanced countries the principle of strict liability has taken firm roots. Instead of fault of the trader, the fault of the product is demonstrated. It is therefore, suggested that the word negligence be dropped from clause (d) and when the complainant proves that a product is defective or service is deficient, and he suffered damage due to no fault of his, he should be entitled to compensation.

The power to enforce orders are laid down in sections 25 and 27. Section 25 provides that the orders may be enforced in the same manner as if it were a decree or an order made by a court in a pending suit but in case of the inability of the CDRAS to execute their order, it shall be lawful for them to send such orders

for execution to the court. Section 27 provides punishment for defaulter.

The question which has been debated before the consumer fora is, whether it is necessary that the decree holder must satisfy first section 25 and only then he can invoke section 27 or it entirely depends upon the decree holder whether to take help of section 25 or 27. Basically in sections 25 and 27 two independent remedies have been incorporated by the legislature for executing the orders of the forum. If the decree holder approaches the consumer forum under section 27, the forum will not be right to ask him to exhaust first section 25 and only then come under section 27. Sections 25 and 27 therefore give two optional remedies to the decree holder and it lies entirely in his discretion what option he is going to exercise.

Section 27 arms the consumer fora with power to inflict punishment or impose fine on the judgment debtor in case of his default. However, rules have not been framed for the exercise of this power by the consumer fora. It is necessary that an express provision be incorporated in section 27 for the said purpose.

The conflicting observations have been made on the question; whether orders passed by the District forum under sections 25 and 27 are appealable to state Commission? It is submitted that the orders passed under sections 25 and 27 are not appealable. Section 15 which gives right of appeal has to be read with section 14. Otherwise any order passed by the forum will be appealable.

However, if there is any miscarriage of justice, the judgment debtor can go to the superior forum for revision.

Consumer fora do not possess express powers to issue interim injunction. However, consumer fora have inherent powers to issue the same like that of civil court. In order to avoid any controversy it has been suggested to amend sections 14, 17 and 21 to provide express power to grant stay or interim relief by the District forum, State Commission and National Commission.

The above discussed powers have been given to consumer fora for protecting consumers. The definition of consumer provides that not only actual buyer is included but also the actual user. However, purchasers of goods for resale or for commercial purpose are excluded. There is no definition of the term commercial purpose but an Explanation was attached to the definition of consumer which provides that the goods purchased and used by the consumer for earning livelihood by self employment are not goods for commercial purpose. This explanation is not in accord with the definition of the consumer which gives locus standi to the user of the goods who may or may not be the actual buyer whereas the Explanation makes it essential that the purchaser and user must be one and the same person. It is also submitted that the explanation clarifies position in respect of those goods which have been purchased for earning livelihood by self employment. But for the rest, redressal agencies have to decide whether the goods purchased are for commercial purpose or not. To determine whether the goods purchased are meant for commercial purpose, following tests be applied.

1. the goods purchased are not for immediate final consumption;
2. there is a direct nexus between the purchase of goods and the profit or loss from their further disposal. Such direct nexus is absent when the goods or services are converted for producing other goods or services;
3. there is a nexus of form and kind between the goods purchased and the goods sold. The nexus is absent where goods undergo transformation and conversion.

Section 12 provides that a complaint can be filed by the consumer to whom goods have been sold or delivered or services provided and section 2(1)(b) says that the complaint can be filed by the consumer who by section 2(d) has been defined not the actual buyer but also actual user. Since the user of the goods or services with the permission of the actual buyer is treated as consumer, their inclusion in the definition will be meaningless unless they have a right to file complaint. It is therefore, suggested that section 12 be amended on the following lines:

A complaint.... by —

- a) the consumer, or
- b) any recognised consumer association, whether such consumer is the member of such association or not, or .....

The consumer fora have not shown unanimity on the issue; who is responsible to the consumer - seller or manufacturer? It is submitted that since the privity rule is inapplicable to the CP Act, so better course is to fix liability on the person who is responsible for the defect.



# ***BIBLIOGRAPHY***

## B I B L I O G R A P H Y

### Books:

- Amos and Walton : Introduction To French Law (2nd. ed. 1963).
- Atiyah P. S. : An Introduction To The Law of Contract (2nd. ed. 1977).
- Atiyah P. S : The Sale of Goods (8th. ed. 1990).
- Azmi S. S. H : Sale of Goods And Consumer Protection In India (1st. ed. 1992).
- Bishop : Advertising And The Law (Benn. 2nd. ed.).
- Bower Spencer & Turner : Actionable Misrepresentation (3rd. ed. 1974)
- Borrie Gorden and: Consumer, Society And The Law (4th. ed. 1980).  
Aubrey L. Diamon
- Chandratre K R : Handbook of Consumer Protection Law (1st. ed. 1992).
- Callmann Rudolf : The Law of Unfair Competition Trade Mark And Monopolies. (3rd. ed. 1991) Vol.
- Cappelletti M : Access To Justice. Vol. 14.
- Chafee Z : Some Problems of Equity (1st. ed. 1950).
- Cheshir, Fifoot : Law of Contract (12th. ed.)  
And Furmston
- David G. Epstein : Consumer Law (2nd. ed. 1981)  
& Steve H Nickles
- Dias. R. W. M & B. S. Markesins : Tort Law (1st. ed., 1984).
- Donald & Heydon : Trade Practices Law (Vol.2) (1st. ed. 1978).
- Dugar S. M : Law Relating To Restrictive and Unfair Trade Practices With Consumer Protection (2nd. ed. 1992).
- Field Chester : Unfair Trade Practices And Consumer Protec-  
Oppenheim, et.al. tion Cases and Comments, American Case Book Series.
- Gleming G John : The Law of Torts (1st. ed. 1957).

- Firestone : The Economic Implications of Advertising  
(Toronto, 1967).
- Hall Jerme : General Principles of Criminal Law (2nd. ed)  
Halsbury's Laws of England (4th. ed.).
- Hart H. L : Law, Liberty And Morality (1963).
- Holland T E : The Elements of Jurisprudence (13th. ed.1924)
- Jhala H. M : The Law of MRTP in India, (1981) at 196.
- John A Spangle : Consumer Law : Cases And Materials  
Ralph J. Rohner (2nd. ed. 1990).  
Dee Pridgen,  
Paul. B. Rasor
- Jonathan M Purver, : Business Law Text And Cases (Ist. ed. 1983).  
Farber Tinsley B  
Jorklund
- Kelson Hans : Pure Theory of Law.
- Kessler & Gilmore : Contracts: Cases And Materials (2nd. ed.1970)
- Krishnan Leela(ed): Legal Control of Consumer Protection  
(Ist. ed)
- Lawson R G : Advertising Law (Ist. ed. 1978).
- Lloyd Lord : Introduction to Jurisprudence  
(3rd. ed. 1972).
- Lyon : The Economics of Free Deals (Ist. ed. 1933).
- Mishra M N : Promotion And Advertising Management  
(Ist. ed. 1994).
- Mulla D F : Code of Civil procedure (1972).
- Nayak R K : Consumer Protection in India An Ecological  
Treatise on Consumer Justice (Ist. ed. 1991).
- Neale A D : The Anti Trust Laws of USA (2nd. ed).
- Nicholl D. S. : Advertising (Ist. ed. 1973).
- Preston : The Great American blow ups : Puffery in  
Advertising and Selling (1975).
- Roseden : A Treatise on the law of Advertising  
(Vol. 1) (Ist. ed. 1978).
- Salmond & Williams: The Law of Contracts (Ist. ed.).

Saraf D N : Consumer Protection Law in India  
(1st. ed. 1970).

Saraf D N : Supplement to The Law on Consumer Protection  
in India (1990).

Seervai M. H : Constitutional Law of India (3rd. ed.) Vol.1.

Smith & Thomas : A Case book on Contract (8th. ed.).

Taperrell, Vermeesch: Trade Practices and Consumer Protection  
& Harland (3rd. ed. 1980).

Treital G H : The Law of Contract (4th. ed. 1975).

Verma B R : Law of Contempt of Court (2nd. ed. 1986).

William G Haliment: Consumer Law, Text, Cases and Materials  
et. al. (1975)  
American Jurisprudence (2nd. Vol).

International Encyclopedia of the Social Sciences : Advertising  
(1986).

#### ARTICLES:

Ahmad Farooq : False And Misleading Advertisements -  
Legal Perspectives, 38 JILI (1996).

Ahmad Farooq : Corrective Advertising : Some Constitu-  
tional Issues, (1996) 3 Comp. LJ.

Ahmad Farooq : Enforcement of Orders of Consumer Forums  
- Legal Position. (1996) 4 Comp. LJ.

Ahmad Farooq : Unfair Trade Practices - An Appraisal of  
Legal Control. (1995) KULR.

Ahmad Farooq : Interim Orders Under Consumer Protection  
Act, 1986 - Some Observations. (1996)  
KULR.

Ahmad Farooq : Consumer Class Action - Some Transla-  
tional Lessons. Civil & Military Law  
Journal (1994) 30 No.2.

Ahmad Farooq : Medical Mal - Practices And Consumer's  
Protection - Paradox or Parrallex -  
(1994) KULR.

Azmi S. S H : Morgan Stanely Mutual Fund v. Kartik Das  
: A Critique XI Alig. LJ 1996.

- Azmi S. S. H : Critique on Indian Oil Corporation v. Consumer Protection Council Kerala 37 JILI (1995).
- Azmi S. S. H : A Critique on society for Civic Rights v. Colgate Palmolive India Ltd. 34 JILI (1992).
- Averite : The Meaning of Unfair Acts or Practices in Section 5 of the Federal Commission Act, 70. Fed LJ 225 (1981).
- Barnet E Randy : A Consent Theory of Contract Col. L. Rev. Vol. 86 Jan, 1986.
- Beales Howard : The Efficient Regulation of Consumer  
Richard Crasswell Information. The Journal of Law and  
et.al Economics Vol.XXXIV (1981).
- Bharatiya V P : Consumer Protection : So Much Done, Much  
More To Be Done. Paper presented in a  
Seminar on Consumer Protection through  
Law conducted by the University of  
Jodhpur in 1989.
- Blumberg I Phillip: Consumer Protection In The States -  
Control of Unfair or Unconscionable  
Practices. Amer. Jour. of Comp. L Vol 34  
(1986).
- Bohlen : Misrepresentation As Deceit, Negligence  
or Warranty 42 Harv. L. Rev. 733 (1992).
- Braucher Jeans : Defining Unfairness : Empathy And Eco-  
nomic Analysis At The Federal Trade  
practices; Bost. Univ. LR (1988) Vo. 68.
- Cayne & Trebilcock: Market Considerations in The Formation  
Of consumer Protection Policy, 23 U.  
Toronto, LJ 396 (1973).
- Charlton & Fawcett: The F.T.C and False Advertising; 17 U.K.  
L. Rev. 599 (1969).
- Chaudhary U K : Unfair Trade Practices and the MRTP Act,  
111 Financial Express (New Delhi) P.5  
16.2.1985.
- Clark Alistair : The Consumer Protection Act, 1987 Vol.50  
MLR 614.
- Cohen : Misleading Advertisements and Combines  
Investigations Act (1969) 15 MC Gill Law  
Journal.

- Crass Well : Interpreting Deceptive Advertising;Bost.  
Richard Univ. L. R. vol.65, July 1985.
- Duggan A J : Fairness in Advertising : In Pursuit of  
the Hidden persuader. Melb. U. L. Rev.  
Vol.11, June 1977.
- Editorial Comment: Car Buyers Warrant A New Deal; Focus  
Sept; Vol.2 1967.
- Editorial Comment: Consumer Protection Act, 1987 New LJ  
October, 1987.
- Editorial Comment: Corective Advertising - The New Response  
To Consumer Protection 72 Colum. L.Rev.  
415 (1972).
- Editorial Comment: Development in the Law - Deceptive  
Advertising. 80 Har.L.Rev. 1013 (1967).
- Editorial Comment: Maryland's Consumer Protection Act. A  
Private Cause of Action For Unfair or  
Deceptive Trade Practices. Mary. L. Rev.  
Vol. 38 (1979) 733.
- Emersion : The Doctrine of Prior Restraint 20 Law  
and Cont. Prob. 648 (1955).
- Gardner : Deception In Advertising : A Conceptual  
Approach, 39 J. Marketing 40, 41-45 (Jan  
1945).
- Gellhorn : Proof of Consumer Deception Before the  
Federal Trade Commission : 17 Kans. L.  
R. 559 (196 ).
- Gerald j Thain : Consumer Protection : Advertising; The  
F.T.C Response : The Business Lawyer  
April, 1972.
- Goldring : The Trade Practices Act, 1974 - 75 and  
the law of innocent Misrepresentation  
(1976) 50 ALR 126.
- Goldring : Consumer Protection and Trade Practices  
Act 1974 - 5'6 Federal L. Rev.
- Goldring John & : Liability of Manufacturers For Defective  
Mark Richardson Goods, ALJ Vol.5, March 1977.
- Goswami Deleep : Supreme Court To The Rescue of Consum-  
ers. (1989) 3 Comp. LJ. 89.

- Gower : Exemption Clauses Contractual and Tortious Liability (1954) 17 MLR 155.
- Grims S Warren : Control of Advertising in the United State and Germany : Volks wagen Has A Better idea. Har. L.R 84 (1971).
- Guest A. G. : Fundamental Breach of Contract (1961) 77 L.Q.R 98.
- Hamilton : The Anicent Maxim Caveat Emptor 40 Yale L J 1133.
- Handler : False Advertising Under the Wheleer Lea Act. 6. Law and contemp Prob.(1939).
- Handler : False and Misleading Advertising 39 Yale L J (1929), 28.
- Hester : Deceptive Sales Practices And Form of Contracts- Does the Consumer have a private Remedy? 1968 Duke L J 831.
- Holmes : FTC Regulation of Unfair or Deceptive Advertising : Current Status of the law 30. De. Panl. L.Rev 555 (1981).
- Horwits : The Historical Foundation of Modern Contract Law.87. Harv.L.Rev.917 (1974).
- Howard Allan : Consumer Protection in Georgia: The Fair  
Bartnich Business Practice Act of 1975. Emory L.J Vol.25 (1976) 445.
- Howard and Hulbert: Advertising And the Public Interest Staff Report to the Federal Trade Commission (1973).
- Jeffries D James: Protection for Consumer Against Unfair and Deceptive Business Marq. L. R Vol 57 No.4(1974).
- Jolowic. J.A : The Protection of the Consumer and Purchase of Goods Under English Law 32 MLR 170.
- Jones : The Cultural and Social Impact of Advertising on American Society 8 Osgoode Hall L J (1970).
- Kinter : A primer on the Law of Deceptive practice 97,192-93 (2d. ed.1978).

- Kinter W. : The Emergence of the Federal Trade  
Christopher Smith : Commission As A Formidable Consumer  
Protection Agency, Merc. L Rev. Vol (26)  
1975.
- Kirkpatrick : The Federal Trade Commission under  
Elman et al : Attack: should Commission's Role Be  
Changed? 49 Anti Trust L.J 1481 (1980).
- Kumar, S. S : Should Consumer Courts be Conferred the  
Power to Grant Interim Relief (1996) 4 C  
T J 103.
- Kumar, S. S. : Alarming Increase In Pendency of Consum-  
er cases (1994) 2 CTJ 199.
- Kumar, S. S : Contests, lotteries and Game of Chance-  
Banned By One Stroke Not By law But By  
MRTP.
- Kumar, S. S. : Exparte Injunction May lead To Tragic  
Consequences. Comp L. Digest Vol. (20)  
1991.
- Kumar Rosy : Promotional Scheme Banned By The MRTP  
Commission : Law Permits But the Commis-  
sion Does Not. Comp L Digest (1991) Sept  
Vol (21).
- Lance Candace : The F T C and Deceptive Trade Practice: A  
Oxendale : Reasonable Standard; Emory. L. J Vol. 35  
(1986).
- Linhoff : Scope of Compulsory Contracts Proper  
(1943) 43 Vol 2 R 586.
- Loyett : State Deceptive Trade Practices legisla-  
tion 46 TUL. LJ. Rev. 724.
- Mark L. Rosemberg: Consumer Class Action: Har Civ.  
Reg .Civ. Lib. L.Rev. 1972 Vol 7.
- Matta A M : Moral Values; Religion and the law: some  
observations. 11:2 R L R (1993) 178.
- Milner : The Rape of the Trade Descriptions Act  
(1975) 38 M L R 694.
- Mussehl R C : The Neighbourhood Consumer Centre (1972)  
47 Norte. Dam L. 1093.
- Nelson and Hoyer: Corective Advertising And Affirmative  
Disclosure Statement: The Potential for  
Confusing and Misleading the Consumer  
46. J. marketing 61 (1982).



- Panday T.N ; Inadquacies in the bill? The Economic Times New Delhi 1984.
- Pitsofsky Robert: Beyond Nader : Consumer Protection And the Regulation of Advertising.Har L. R. Vol 90 (1977).
- Sachdev M L : Award of Compensation under MRTTP Act (1985) 2 Comp LJ 86.
- Santhanan : Injunction orders By The MRTTP Commission (1986) 3 Comp.L J 91.
- Santhanan : Do Consumer Courts have No Power To Grant An Ad Interim Relief (1994) 3 Comp. LJ 43.
- Santhanan : Unfair Trade Practice: Compensation for loss or damage(1985) 1 Comp L J 117.
- Saraf D N : Monopolies and Restrictive Trade Practices Commission in Action:Some Reflections on Consumer Protection 31 J IL1 (1989) 289.
- Saraf D N : Some Facets of Consumer Justice Through Consumer Disputes Redressal Agencies 34 J IL 1 (1992) 36.
- Saxena IC : The Consumer Protection Act, 1986- A View Point 30 J IL 1 321.
- Suhuck Peterh and: The Consumer Class Action ; An Endangered Species: San Diego L.Rev.(1994)Vol 12:39.
- Scidasive G Nair: Mens rea in Consumer offences: Leela Krishnan (ed) legal Control of Consumer Protection.
- Singh S N : Consumer Protection Legislation : A Critique 29 J IL 1(1987) 380.
- Singh S N : Appellat And Revisional Jurisdiction under Consumer Protection Act.Corp L. Advisor. April 1992.
- Stewart : The Law of Comparative Advertising : How Much Worse is Better Than Great. Col.L R (Vol 76:80) 1976.
- Trebilcock : Consumer Protection in Affluent Society (1970) 16 M. C Gill 263-282.

- Tur H.S.Richard: Litigation And the Consumer Interest: The Class Action and Beyond; Legal Studies Vol. (2) 1982.
- Waddames. S M : Strict liability of Suppliers of Goods (1974) 37 M L R 154.
- Watter Stern : Consideration and Gift 14 Int and Com. L. Quart 677.
- Winfield : Public Policy in the English Common Law, 42. Har. L R 76 (1928).
- Worthy A X S : Recent Developments in Consumer Law in Christopher Canada Int. Comp. Quart L Rev April (1980).
- Wright : Introduction to the Law of Torts (1944) 8 CLJ 238.
- Venkat : Injunction under the MRTP Act Some Aspects (1985) 1 Comp L J 30.
- Venkat : Unfair Trade Practices: Compensation for loss or damage (1985) 1 Comp L J 117.
- Ziegel Jacob : The Future of Canadian Consumers (1973) 51 Can. Bar. Rev. 203.

#### REPORTS:

Advertising Guidelines : Information Circular No.10 (1995), TPR 403, (Australia).

Annual Reports (15th - 23rd) Pertaining To The Execution of The Provisions of The Monopolies and Restrictive Trade Practices Act, 1969 from 1st. January 1985 to 31st. December 1993.

Gazette of India Text 22nd. December 1984.

Guides Against Deceptive Pricing 16 CPR 233 (1964) USA.

Guides on Endorsements and Testimonial in Advertising, 16 CPR 255 (1980) USA.

Law Commission's Report, First Report on Exemption Clauses On Contracts (1969) Law Commission No. 24 (1968-69) HC 403. (England).

Law Commission's Report On Sale And Supply Of Goods. Law Com. No. 160 137 1987 (England).

Lok Sabha Debates MRTP (Amendment) Bill 1984 Vol.48 May 7.

Monopolies and Inquiry Commission Report (1965)

Offences Relating to Interference with the Courts of Justice (1979) Law. Com. No.96 (England).

Phillmore Committee's Report (England)

Report of The Committee on Distribution of Income and Levels of Income (1964).

Report of The Convention of Presidents and Members of the State Consumer Disputes Redressal Commission New Delhi held on 24th Jan, 1994,

Report of Consumer Warranties and Guaranties in The Sale of Goods Toronto, June (Canada).

Report of The High Powered Expert Committee on Companies and MRTP Acts (1978).

Report of The Molony Committee on Consumer Protection (1962) (England).

Report of The Royal Commission on Consumer Problem and Inflation (The Prarice Report) 1968 (England).

Swanson Committee Report (Australia).

Unfair Method of Competition, Annual Report of The Federal Trade Commission (1938) USA.

#### STATUTES/RULES:

Cigarette (Regulation of Production Supply and Distribution) Act, 1975.

Code of Civil Procedure, 1908.

Code of Civil Procedure, 1973.

Combines Investigation Act 1910 (Canada).

Combines Investigation Act 1923 as amended by the Act of 1951, 1952, 1960, 1976. (Canada).

Consumer Protection Act, 1987 (England).

Consumer Protection Act, 1986.

Consumer protection Rules, 1987.

Delhi High Court (Original Side) Rules, 1967.

Drugs and Cosmetics Act, 1940.

Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954.

Essential commodities Act, 1955.

Federal Act (Switzerland).

Federal Civil Procedure Code (USA).

Federal Consumer Class Action Act, 1976 (USA).

Federal Trade Commission Act, 1914 as amended by Wheeler Lea Amendment Act, 1938 (USA).

Indian Contract Act, 1872.

Indian Penal Code, 1860.

Indian Evidence Act, 1872.

Magnum - Moss Warranty - Federal Trade Commission Improvement Act (USA).

Maryland Consumer Protection Act, 1973.

Monopolies and Restrictive Trade Practices Act, 1969.

Monopolies and Restrictive Trade Practice Commission Regulations 1974, 1991.

Obscene Publication Act, 1959 (England).

Prevention of Food Adulteration Act, 1954.

Restrictive Trade Practices Act, 1976 and 77 (England).

Sale of Goods Act, 1930.

Sherman Act, 1980 (USA).

Standards of Weights and Measures Act, 1976.

Supreme Court Rules.

Supreme Court Rules (England).

The Bombay Lotteries (Control Tax) and Prize Competition (Tax) Act, 1958.

The Consumer Protection (Code of Practice for Trade on Price Indication) Approval order 1988 (S.I 1988/2078) (England).

Trade and Merchandise Marks Act, 1958.

Trade Descriptions Act, 1968 (England).

Trans - Alaska Oil Pipeline F.T.C. Act, 1973.

Trade Practices Act, 1974 and 1977 (Australia).

Unfair Contract Terms Act, 1977 (England).